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RIGHT OF THE POSTMASTER GENERAL OR ANY OF THE OTHER SECRETARIES OF THE FEDERAL GOVERNMENT TO MAKE REGULATIONS FOR THEIR RESPECTIVE DEPARTMENTS.

In last week's issue of the CENTRAL LAW JOURNAL, we called attention to the recent case of American School of Magnetic Healing v. McAnulty, 23 Sup. Ct. Rep. 33, in which it was held that the postmaster general had no authority to exclude from the mails letters addressed to a firm exploiting the system of mental or magnetic healing, on the ground that he believed it to be a fraudulent scheme to obtain money. (56 Cent. L. J. 1.) This week we call attention to a decision along the same line and equally important, that of Payne v. United States, handed down December 3, 1902, by the Court of Appeals of the District of Columbia and reported in 30 Wash. L. Rep. 791. In this case it was held that the postmaster general had no discretion in respect to the admission of a publication to the mails at second-class rates beyond deciding the question whether such publication is one included in the category prescribed by Congress; and it is not competent for them to impose additional requirements beyond those specified in the statute.

On July 17, 1901, the postmaster, by special regulation, sought to limit the class of publications entitled to second-class rates on the ground that the privilege was being abused and that the government was thereby losing thousands of dollars annually. The provisions of the act of Congress were considered loose and defective and not to sufficiently evidence the intent of Congress. The act of Congress referred to is that of March 3, 1879 (20 Stat. 355), providing "that second-class matter must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry, and having a legitimate list of subscribers: Provided, however, that nothing herein contained shall be so construed as to admit to the second-class rate regular publications designed primarily for advertising purposes, or for free circulation, or for circulation at nominal rates." The regulation of the postal authorities which was expected to make clear the intent of Congress and to exclude much undesirable and unprofitable matter from the privilege of second-class rates, was section 276 of the postal regulations. In referring to the characteristics of second-class matter, the regulation provides: "Periodical publications herein referred to are held not to include those having the characteristics of books, but only such as consist of current news or miscellaneous literary matter, or both (not including advertising), and conform to the statutory characteristics of second-class matter."

This regulation, when first announced, created consternation all over the country. Scientific and trade journals were thrown into great anxiety and the third assistant postmaster general who has charge of second-class matter, and who was thought to be responsible for the regulation referred to was execrated and condemned by the press everywhere for what was considered an arbitrary ruling. It seems, however, that the regulation was not aimed at scientific or trade journals, but at certain publications in book form used for reference purposes and which were carried at great loss to the department. The first case under this regulation,—the one to which we have directed attention—was the result of the attempt to exclude from the mails the well-known railway guide, known as the "*Travelers' Official Guide*" issued quarterly in large volumes and bound in paper covers. The proprietors of this publication, failing to dissuade the postmaster general from his refusal to permit the "*Guide*" to be mailed at second-class rates, instituted *mandamus* proceedings in the Supreme Court of the District of Columbia. This court granted the prayer of the relator and ordered the postmaster general to receive and transmit the *Guide* at second-class rates. From this decision the postmaster general took the case up to the court of appeals. In affirming the decision of the lower court the appellate court said:

"It is very clear that the Congress of the United States has not committed to the postmaster general, or to anyone else, the matter of determining what should be carried in the mails as second-class matter, and what as matter of the third class. It has reserved

the power exclusive to itself. It has itself made the classification; and it is not competent for the postmaster general to add anything to the statute or to take anything from it. It may be that the classification has not been made with all the definiteness that is desirable. It may be, even, that the privilege of the mails has been grossly abused by the introduction into them of mail matter of the second class which was never anticipated by Congress. If, as alleged in the pleadings, the cost of transmission of the relator's periodical through the mails as second-class matter has been only forty cents per number a year, and the cost of such transmission to the government has been two dollars a year, while the cost of its transmission as third-class matter is the sum of three dollars and twelve cents a year, there would seem to be some inequality with which Congress should deal; yet it is not the province of the postmaster general to remedy the evil, if evil there is, by a postal regulation, or by unwarranted interpretation of the law. The citizen who desires to have his publication carried in the mails of the United States as second-class mail matter, and who has fully and fairly complied with all the requirements of the statute in regard thereto, has acquired a positive legal right to have it so carried; and his right will be enforced by the writ of *mandamus*, if the postmaster general arbitrarily or without valid legal reason refuses to receive and transmit such publication. Of course the postmaster general and his subordinates are required to use judgment and discretion, and it may sometimes be a matter of much difficulty to identify a publication as one included in the category prescribed by Congress. But their discretion is limited to this question of identification; and it is not competent for them to impose additional requirements beyond those specified in the statute."

In speaking of the particular regulation under authority of which the postmaster general had sought to exclude the publication involved in this case, the court said: "The regulation restricts publications entitled to second-class rates to 'such as consist of current news or miscellaneous literary matter.' It wholly omits and excludes periodicals devoted to the sciences, arts, or some special industry. Now, it may be that the words 'miscellaneous literary matter' might be construed to mean the same thing as 'periodicals devoted to literature;' but certainly 'current news' is not the equivalent of 'information of a public character.' The regulation would restrict the second-class mail matter to the daily and weekly papers which disseminate 'current news;' but undoubtedly the information conveyed by the relator's *Guide*, a copy of which has been filed in the proceedings as an exhibit, is information of a public character, most useful not only to those immediately connected with the railroad and steamboat transportation of the country, but likewise to the traveling public. And yet this is excluded by the regulation. It is true that the regulation also provides that the publication to be admitted as second-class mail matter shall 'conform to the statutory characteristics of second-class mail matter.' But if the regulation means anything at all, or is intended to have any meaning, it is to superadd to the statutory characteristics another or other requirements not prescribed by the statute. This cannot lawfully be done."

This same rule is applicable to other departments of the government. Thus, in the case of Morrell v. Jones, 106 U. S. 466, it appeared that an act of Congress authorized the importation into the United States, free of duty, of "animals alive, specially imported for breeding purposes from beyond the seas;" and that the secretary of the treasury, construing the act for himself, published a treasury regulation whereby he instructed collectors, that before admitting such animals from abroad, they should be satisfied that the animals were of a superior stock, and adapted to improve the breed in this country. The supreme court said, in regard to this regulation: "The secretary of the treasury cannot, by his regulation, alter or amend a revenue law. All he can do is to regulate the mode of proceeding to carry into effect what Congress has enacted. In the present case we are entirely satisfied that the regulation acted upon by the collector was in excess of the power of the secretary. The statute clearly includes animals of all classes. The regulation seeks to confine its operation to animals of 'superior stock.' This is manifestly an attempt to put into the body of the statute a limitation which Congress did not think it necessary to prescribe. Congress

was willing to admit, duty free, all animals specially imported for breeding purposes; the secretary thought this privilege should be confined to such animals as were adapted to the improvement of breeds already in the United States. In our opinion, the object of the secretary could only be accomplished by an amendment of the law. That is not the office of a treasury regulation."

We are inclined, from a careful consideration of these authorities, to the opinion that the authority of the several secretaries of the federal government to make regulations for their respectlve departments is limited to the plain and literal terms of the acts of Congress applicable thereto. It is, of course, not impossible that the department officers in discharging their duties will discover many improvements to the provisions made by Congress and find many points at which the latter are sorely defective and in need of amendment. Under such circumstances, however, it would be the safer policy, we think, for the heads of the several departments to suggest such improvements or need of amendments to Congress, rather than to attempt to effectuate them by constructive and arbitrary regulation. Such, also, we believe to be the law.

NOTES OF IMPORTANT DECISIONS.

MARRIAGE — EXTRA-TERRITORIAL FORCE OF STATUTES PROHIBITING A RE-MARRIAGE FOR A DEFINITE PERIOD AFTER A DECREE OF DIVORCE. — Laws prohibiting the marriage of divorced persons for a definite period after divorce have been the subject of much controversy. In the recent case of *In re* Wood's Estate, 69 Pac. Rep. 900, the question before the Supreme Court of California was as to the extra-territorial validity of a statute providing that the marriage of a divorced person within one year after the rendition of the decree was absolutely void, unless the subsequent marriage was with the former spouse. In this case, a woman, divorced in California, married in Nevada within five months after her divorce. The question was as to the validity of this subsequent marriage. The court was divided four to three. The minority held the marriage void on the ground that the statute referred to, was included in the decree, and, as a part of the judgment, applied with equal force without or within the jurisdiction. The majority held the marriage good on the ground that the statute was not a part of the decree, which in words rendered the divorce absolute, but that it was merely a penal statute applicable to divorced persons, and, as such, had no extra-territorial force. On this latter point the majority of the court say:

"Let us make a close examination of this section. It says, in substance, that after the marriage is dissolved the former husband and wife may contract a subsequent marriage with each other immediately. Thus the section itself recognizes that the first marriage is dissolved by the decree; for, if not dissolved by the decree when rendered, how could these two people intermarry again? If the decree, when rendered, is but an interlocutory or *nisi* decree, — that is, a decree which does not take effect until one year after its rendition. — then the former husband and wife could not intermarry within that period. In answer to this legal dilemma it is said, in substance, that the decree dissolving the marriage is complete as to the husband and wife, but not full and complete as to any other person. This presents another dilemma, for it would be inconsistent to hold that these two people were entirely and completely divorced as to each other, but not divorced to the extent that either could marry a third person. Surely, if they are completely divorced as to each other by the decree, then by all law they are completely divorced as to the whole world. This must be so, for the decree is *inter partes*, and, as far as its binding effect is concerned, the world at large has nothing to do with it."

Further on, in arguing as to the extra-territorial force of these statutes, the court cites the case of State v. Shattuck, 69 Vt. 403, 38 Atl. Rep. 81, 60 Am. St. Rep. 936. In this case, the court says: "If a statute, silent as to marriages abroad, as ours is, prohibits classes of persons from marrying generally, or from intermarrying, or declares void all marriages not celebrated according to prescribed forms, it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those marriages are to be judged of by the courts of such state, just as though the statute did not exist." Bishop on Marriage and Divorce (section 867) declares the same rule. Therefore, when section 61 uses the language "a subsequent marriage contracted by any person," etc., it only refers to a subsequent marriage contracted in the state of California by any person, and the section should be read as though the words "in the state of California" followed the word "contracted." "It cannot be possible that the legislature by this section attempted to declare what particular marriages contracted in the state of Nevada, or any other place in the whole world, would be invalid and void."

In answering the argument of the majority of the court, Temple, J., speaking for the dissenting minority, said: "It is admitted that the statute renders the parties incapable of marrying, during the period, within this state. If that be so, the provision has the precise effect in this state as though it were a valid clause in the decree; in other words, as to this state it is to be deemed a part of every decree of divorce. There is no au-

thority or precedent for a different construction as to the effect of the decree within and without the state. To so hold would work partial defeat of the legislative policy, which every one must admit is in the interests of good morals. If the remedy is not as complete as it might have been, that will not affect the execution of the law. That such was the legislative intent is obvious. Similar statutes have long existed in other states, 2 Nels. Div. & Sep., par. 582a. Two classes of statutes upon this matter are discussed in the authorities: First. Those which prohibit marriage within the limited period, but do not declare the second marriage void. It is held that such statutes are penal, and have no extra-territorial effect. In such a case, therefore, a marriage in another state, which is lawful there, will be held to be valid in the state of the domicile, and where the decree was obtained. The other class of statutes are like ours in reference to this matter. They declare the subsequent marriage void from the beginning, unless the parties shall have been divorced for a limited period. In such cases a subsequent marriage within the period is held void, although entered into in another state. This is upon the ground that the parties are not unmarried persons, and therefore not capable of lawfully contracting marriage anywhere. Under such conditions it would follow as a matter of course that the statutory provision is to be deemed as qualifying the effect of every decree of divorce thereafter rendered. This question is so fully and so well considered in McLennan v. McLennan, 31 Oreg. 480, 50 Pac. Rep. 802, 38 L. R. A. 863, 65 Am. St. Rep. 835, that it is only necessary to refer to that case for a full statement of the argument. The statute of Oregon simply declared what I conceive to be the effect of several sections of our Civil Code, construed together, with the difference that the period during which the parties were declared incapable of marriage was for the time to take an appeal, and during an appeal pending, if one were taken. The parties married in the state of Washington during the period of the prohibition. It was held that the divorce was only partial, and would not be complete until the expiration of the limited period. The distinction between this class of cases and those cited by appellant is clearly stated. To the same effect are the cases of Wilhite v. Wilhite, 41 Kan. 159, 21 Pac. Rep. 173, and Conn v. Conn, 2 Kan. App. 419, 42 Pac. Rep. 1006. See, also, Calloway v. Bryan, 51 N. Car. 570; Cox v. Combs, 8 B. Mon. 231."

IS A FIRE INSURANCE POLICY A PROMISSORY NOTE, PAYABLE IN EVENT OF FIRE?

The essentials of a negotiable promissory note are that it be given for a valuable consideration and for a definite sum, payable unconditionally at a time certain, or on the happening of a fact sure to occur.

Fire insurance policies are personal contracts of indemnity against loss or damage from an uncertain element, upon conditions both antecedent and subsequent.

The impression in many quarters that the issuance of a policy of fire insurance, the payment of the premium stipulated therein, and a fire, are all that is necessary to create a liability upon the part of the insurer, regardless of the conditions and stipulations contained in the policy; in other words, that the policy is, practically, a promissory note, payable if and when a fire occurs. It is singular that such a view should be entertained and persistently adhered to by courts in any jurisdiction; and there is, perhaps, not a judge in America who would not individually disclaim it; and yet the books are full of the reports of decisions against insurance companies which have been rendered pursuant to this startling misconception of the rights of an insured under his policy. There is no more justification for judicial decisions of this character than for the idea held by some recording agents, that insurance companies are organized for their particular benefit.

I invite you to consider the attempts along one certain line, to convert the fire insurance contract by judicial reconstruction, into a promissory note payable in the event of fire.

The forms of policies in general use throughout the country contain the provision, familiar to you all, against other insurance, incumbrances, change of possession and the like, unless consented to by an indorsement in writing thereon. These policies contain the further condition that no officer, agent or representative of the company shall have the power to waive any of the provisions thereof, except such as may be waived by indorsement in writing, and only in that prescribed mode. Nevertheless, for many years, some American courts, whose decisions ordinarily carry great weight, in utter disregard of the right of parties to make their own contracts and of elementary principles which control in the construction of all contracts, and in the trial of of all cases at law and in equity, have held that the knowledge of a recording agent of an insurance company of facts, information concerning which he had at the time the policy in suit was written, is binding upon the company and constitutes a waiver by the company of the particular policy condition or conditions violated by the facts known to the agent when the policy was delivered. Thus in many jurisdictions fire underwriters have been, and may yet be, at the mercy of forgetful or dishonest recording agents and negligent or unscrupulous policyholders.

The theory upon which these decisions have been rendered is best and most fairly stated by Judge Thayer, of the United States Circuit Court of Appeals for the Eighth Circuit, in the majority opinion in Northern Assurance Company v. Grandview Building Association, 101 Fed. Rep. 77, which case has, however, been overruled by the Supreme Court of the United States:

Power of Agent. — "The doctrine in question rests upon the ground that facts made known to the agent of an insurance company who is empowered by it to solicit insurance, countersign and issue policies and collect premiums is the knowledge of his principal, and that a fraud would be perpetrated if the insurance company, through the medium of its agents, was allowed to deliver one of its policies and accept the premium thereon, with knowledge of facts which, under its provisions, render it void *ab initio*. To prevent the perpetration of such frauds the courts have very generally held the insurer estopped from taking advantage of a condition or conditions found in one of its issued policies, which, in the light of known facts, rendered the same void from the time of its delivery, or they have indulged in the charitable presumption that the insurer intended to waive the benefit of such a provision, or that, through accident or mistake, it failed to modify the condition before the delivery of its policy, as [illegible] o do, so as to render it valid."

In the opinion from which I have quoted, decisions from several states, including Nebraska and California, and a number of text-books on the law of insurance, including the valuable work of Judge Ostrander, are cited to sustain the doctrine, subsequently, and in the same case, repudiated by the United States Supreme Court. But though, as already indicated, this view finds support in the utterances of some courts, it has never been accepted as good law by any standard law writer. Judge Ostrander himself is my authority for the statement that he disavows it. What he does intend in his reference to the cases so holding (Ostrander Fire Ins., Sec. 243) is to recognize the fact that courts which make over the insurance contract to suit themselves and which disregard the elementary rule of evidence which does not permit a written contract to be varied by parol testimony, base their decisions upon the assumed equitable principle "that the insurer, having accepted the premium with full knowledge of the other insurance, ought not to be permitted to escape performance of the obligation it has assumed and for which it has received the consideration demanded." Of course, these courts, in thus giving free play to their notions of what an insurance policy ought to provide, have stricken out of the contract the condition restricting the powers of agents and prescribing the mode of the exercise of such powers as they possess.

The opinion and judgment of the Circuit Court of Appeals in the Grandview Building Association case was principally grounded on the previous decisions of the same court in Firemen's Insurance Company v. Norwood, 69 Fed. Rep. 71, which grew out of a fire at Larned, Kans., and in which the court, in an opinion written by Circuit Judge Caldwell, attributed to a recording agent at that place the powers of a general agent, and held the company responsible for what this local agent had done, as if his acts had been done by a general agent. It is submitted that a mere ticket agent of the railroad which goes through the town of Larned, Kans., and who sells tickets which have on their face the lithographed signature of the general passenger agent of the railroad, might, with the same propriety, be treated as a general agent of the railroad company and clothed with all the corporate powers which may be exercised by any general agent of a corporation.

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The cases upon this point in different jurisdictions, and frequently in the same court, as for instance, in the New York Court of Appeals, are apparently in irreconcilable conflict; but an analysis of all the decisions which accord with this false theory will disclose that in them all is the complete disregard of certain fundamental principles already referred to. In the opinion of the United States Supreme Court in the Grandview Building Association case, 183 U. S. 308, it is suggested that these cases assume that the recording agent had full knowledge of all the facts; that such knowledge must be deemed to have been disclosed by him to the company, and that consequently it would operate as a fraud upon the assured to plead a breach of the conditions; but, says the court, speaking through Mr. Justice Shiras:

"This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence and the express provision that no waiver shall be made by the agent except in writing indorsed upon the policy."

Every well-informed layman knows that it is an elementary rule of evidence, enforced in all courts, that parol testimony is inadmissible to contradict or vary the terms of a valid written instrument. In Dewees v. Manhattan Insurance Company, 35 N. J. L. 366, the reason for this rule is thus tersely stated by Chief Justice Beasley, of New Jersey:

Written and Parol Evidence. — "The common good requires that it shall be conclusively presumed in an action at law, in the absence of deceit, that the parties have committed their real understanding to writing. Hence it necessarily follows that all evidence merely oral is rejected whose effect is to vary or contradict such expressed understanding. Such rejection arises from the consideration that oral testimony is unreliable in comparison with that which is written. It is idle to say that the estoppel, if permitted to operate, will prevent a fraud or inequitable result; most parol evidence contradic-

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"This mode of reasoning overlooks both the general principle that a written contract cannot be varied or defeated by parol evidence and the express provision that no waiver shall be made by the agent except in writing indorsed upon the policy.'

Every well-informed layman knows that it is an elementary rule of evidence, enforced in all courts, that parol testimony is inadmissible to contradict or vary the terms of a valid written instrument. In Dewees v. Manhattan Insurance Company, 35 N. J. L. 366, the reason for this rule is thus tersely stated by Chief Justice Beasley, of New Jersey:

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tory of a written instrument has the same tendency; but such evidence is rejected, not because, if true, it ought not to be received, but because the written instrument is the safer criterion of what was the real intention of the contracting parties."

This is a rule of universal application, and is enforced in suits arising upon all classes of contracts, except in suits upon insurance policies; but the Supreme Court of Wisconsin went so far, in Dick v. Equitable Fire and Marine Ins. Co., 92 Wis. 46, as to declare that the restrictions, set out in the closing pargaraph of the standard policy, upon the powers of agents and the mode in which their powers are to be exercised are ineffectual! Such decisions are based on a prejudice that is astounding, an ignorance that is inexcusable and a wilful abandonment of the right of parties to make their own contracts.

The Supreme Judicial Court of Massachusetts, in Kyte v. Assurance Company, 144 Mass. 43, stated the reason for the insertion of these restrictions in the policy in the following language:

"The company, which has seen fit to prescribe that the terms and conditions of its policy shall only be waived by its written or printed assent, has prescribed only a reasonable rule to guard against the uncertain ties of oral evidence, and by this the insured has assented to be bound."

Mr. Justice Shiras, in the Grandview Building Association case, says:

"Such express provision was intended to protect both parties from the dangers involved in disregarding the rule of evidence."

Again he says:

"It should not escape observation that preserving written contracts from change or alteration by verbal testimony of what took place prior to and at the time the parties put their agreements in that form is for the benefit of both parties. * * * If the agent had died, or his memory had failed, the defendant company might have been at the mercy of unscrupulous and interested witnesses."

There has recently been considerable lay and professional criticism of the United States Supreme Court. It is contended by demagogues that this is a government by injunction, and the unfavorable comment from bar and press upon the decisions in the income tax and insular cases may be cited as examples of the tendency to criticism, mostly ill-timed, ungenerous and disrespectful, of the ablest and most dignified judicial tribunal in all the world. But our National Supreme Court has always sacredly preserved the right to make contracts and enforced that the right to the same extent as the obligations of contracts; the rules of evidence have always there been heeded; they have never been cast aside in order to bring about a particular result, and no judgments of that court have been rendered because oral testimony has been permitted to vary the terms of a valid written instrument.

Other Insurance.—In Carpenter v. Providence-Washington Ins. Co., 16 Peters 495, decided by the Supreme Court in 1842, two propositions were established: First, that where a policy provides that notice shall be given of any prior or subsequent insurance, otherwise the policy to be void, such a provision is reasonable and constitutes a condition, the breach of which will avoid the policy; second, that where the policy provides that notice of prior or subsequent insurance must be given by indorsement upon the policy or by other writing, such provision is reasonable and one competent for the parties to agree upon, and constitutes a condition the breach of which will avoid the policy.

In Merchants' Mutual Ins. Co. v. Lyman, 15 Wallace, 664, the court, speaking through the late Justice Miller, said:

"Where there is a written contract of insurance it must have the same effect, as the adopted mode of expressing what the contract is, that it has in other classes of contract, and must have the same effect in excluding parol testimony in its applicato it that other written instruments have."

In New York Life Insurance Company v. Fletcher, 117 U. S. 519, the late Mr. Justice Field said:

"It would introduce great uncertainty in all business transactions if a party making written proposals for a contract, with representations to induce its execution, should be allowed to show, after it had been obtained, that he did not know the contents of his proposals, and to enforce it, notwithstanding their falsity as to matters essential to its obligation and validity. Contracts could not be made, or business fairly conducted, if such a rule should prevail, and there is no reason why it should be applied merely to contracts of insurance."

In Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452, the court announced:

"The courts may not make a contract for the parties. Their function and duty consists simply in enforcing and carrying out the one actually made."

But, as has been stated, several of the State and Federal courts have swung far away from these plain and simple propositions. Many thousands of dollars have been paid upon judgments which may be said to have been unjustly rendered, and possibly the payment of millions of money has been coerced by these decisions, backed only by the power of judicial office, and it was inevitable that the highest court of the nation should be appealed to to straighten out the tangle and enforce the insurance contract as the parties made it.

The Grandview Building Association, owning and conducting a boys' military academy at Lincoln, Neb., insured as household goods in the Northern Assurance Company of London the contents of the academy, upon which there was already other insurance. The fact of the other insurance was unknown to the Northern agent, although upon the trial of the case the presi-

dent of the association swore, and the jury found, that the agent knew, when he delivered the Northern policy, of the other insurance upon the property. A fire occurred; the company learned for the first time of the prior insurance; liability was denied because consent thereto had not been given in writing, indorsed upon the policy; suit was brought in one of the state courts of Nebraska, which was removed to the federal court and there tried. The policy was of the New York standard form, containing the provision already referred to, against other insurance not consented to by indorsement upon the policy, and also that provision restricting the power of the agents of the company to waive any of the terms of the policy, except as therein provided. Upon the special finding by the jury that the agent of the Northern company knew when the policy was written and delivered that there was another policy covering the subject of insurance, the United States Circuit Court rendered judgment against the company, which was affirmed by the United States Circuit Court of Appeals for the Eighth Circuit. Thereafter, by writ of *certiorari*, the case was taken to the Supreme Court of the United States, in which court, on January 6 of the present year, an exhaustive opinion was filed, approving the wisdom of the provision against other insurance, sustaining the right of insurer and insured to make their own contracts without judicial interference, refusing to permit oral testimony to establish a waiver of any provision of a written instrument, and reversing the judgment against the company of both the trial and the appellate courts.

With reference to the policy provision against other insurance the court says:

"Overinsurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policy rendering it void in case other insurance has or should be made upon the property and not consented to in writing by the company is customary and reasonable."

The court states in the following words its refusal to permit oral testimony to vary the terms of the fire insurance policy:

"As to the fundamental rule that written contracts cannot be modified or changed by parol evidence, unless in cases where the contracts are violated by fraud or mutual mistake, we deem it sufficient to say that it has been treated by this court as inviolate and salutary. * * * Policies of fire insurance in writing have always been held by this court to be within the protection of this rule."

The importance of this decision and its far-reaching influence and effect can scarcely be overstated. The principles it enunciates apply to many other conditions of the policy, and the doctrine that a company is bound by the mere knowledge of its agent, when the policy is delivered, of facts which make it void is effectually punctured.

Decisions of Federal Courts.—In the federal courts of the sixth, eighth, and ninth circuits, comprising the states of Michigan, Ohio, Kentucky, Tennessee, Arkansas, Missouri, Iowa, Minnesota, the two Dakotas, Nebraska, Kansas, Colorado, Wyoming, Utah, Montana, Idaho, Oregon, Washington, California and Nevada, the rule hitherto prevailing is reversed, for all the federal courts are bound to follow this decision. The argument of the learned justice is so simple and clear, and the fallacy of the other view so plainly set forth, that it is not too much to prophecy that those state courts which have fallen into error may be persuaded thereof and induced to shake off their prejudices and anchor once more to legal principles; for, while laws may change with changing conditions, principles are eternal, and no considerations of convenience, nor of sympathy, nor of mere individual opinion, whether of judges, counsel or parties, ought to divorce the facts of a lawsuit from the principles by which it must be determined, and it is inconceivable that any court of last resort will yield a blind and sullen adherence to a palpable wrong.

It is fortunate that courts and judges merit the public confidence reposed in them. They may, at times, err in judgment but the motives which actuate and control the American bench are pure, and with a pure judiciary there is always hope for the correction of errors and the righting of wrongs; political issues may change, new questions may arise, clouds may loom on the political horizon, revolutions, even, may impend, but the courts may be relied on to safeguard property rights.

The commerce of the world needs protection against the fire dragon and the perils of the sea, and for a comparatively insignificant expenditure the business of our expansive modern civilization is indemnified from the ravages of fire and water; the workingman may lie down to dreamless sleep under his humble roof in the security of his policy of insurance against fire, for he knows that, though the flames may lick up what represents the savings of years, he also will be indemnified. No business is more completely bottomed on the confidence which permeates society than insurance. The insured's word is taken implicitly for nearly every fact connected with the insurance and the validity of the contract is made to depend on his veracity, and therefore no class of litigants has better claims upon courts of justice for the enforcement of their contracts than insurance companies.

But the security of merchant and householder lies in the integrity of the insurance contract. State regulations which keep dishonest men and insolvent companies out of the field are well, but legislative and judicial raids on the insurance business are mere folly, and whenever conditions are created under which the annual losses and expenses of a company exceed its annual income, the security of every policyholder and the integrity of every policy is necessarily impaired.

Everybody ought to be interested in the prosperity of legitimate underwriting. Mr. Justice Shiras says:

"The community at large have a deep interest in the welfare and prosperity of such beneficial institutions as fire insurance companies."

Such being the beneficent character of the business of fire insurance agents need not stand on mere technicalities in the adjustment and settlement of honest losses, and they may scorn to employ any methods but the purest. They should, however, defy fraud and imposture, and can afford to be patient under temporary defeats, for time and right and law are on their side.

Omaha, Neb. RALPH W. BRECKENRIDGE.

VARIOUS FORMS OF MENTAL ALIENATION IN THEIR RELATION TO CRIME.

The term mental alienation, which in ordinary medical as well as general usage is synonymous with insanity, denotes any deviation of the mental faculties (intelligence, sensibility, will) from an assumed normal or or healthy standard. In a legal sense, such mental unsoundness constitutes insanity. It is sometimes said, that there is a conflict between the legal and medical ideas of insanity and that certain forms of insanity, well understood among alienists, are not "recognized" by the courts. There is no foundation in true legal principle for the distinction thus implied. The legal position is simply, that a product of mental disease is not a will, a contract, a crime.[1] In criminal cases, the rule, supported by the great weight of reason is, that whenever, from any cause, the faculties of a person are so deficient or impaired, that he is without power of distinguishing right from wrong, or of so governing his actions as to adhere to the right and avoid the wrong, such person is not a responsible moral agent and is not punishable for acts falling within the definition of crime.[2] The law does not undertake to define kinds or degrees of insanity, but merely attempts to ascertain whether a person has sufficient faculty to do the particular thing in question.[3]

The tests of insanity are not matter of law. In the criminal law, the constituent elements of legal responsibility are capacity of intellectual discrimination and freedom of will. If there be either incapacity to distinguish between right and wrong as to the particular act, or delusion as to the act, or inability to refrain from doing the act, there is no responsibility. Whether such conditions exist in any particular case is ultimately a question of fact, to be ascertained by means of competent evidence and to be determined by a jury.[4]

Mere weakness of intellect does not exempt from punishment; but it has been held, that if a person is so weak of intellect that his perceptions of consequences and effects are only such as are common to children of tender years, he should not be held criminally liable.[5] Insanity may be general or specialized. The former state is characterized by a lesion of the general activity. The latter state is variously designated as monomania, partial or systematized insanity, paranoia. These insanities are relatively numerous and are characterized by hallucinations, especially of hearing, and by delusions. The most dangerous type of this form of insanity, which leads to many homicides, is that which is characterized by delusions of persecution. The rule of liability as to such cases is, that a person laboring under an insane delusion must be considered in the same situation as to criminal responsibility as if the facts were as they appear to him.[6] For instance, if he believed another person to be in the act of attempting to take his life and killed him in supposed necessary self-defense, he would not be punishable.

Mental alienation may likewise take the form of a morbid impulse, or an irresistible tendency to perform a particular action. Under the general rule above stated, if one commits an act under an insane impulse which he could not control, he cannot be held criminally accountable.[7] This class of alienations is generally designated under the names obsessions and lesions of the will, what is affected being the will, taken as a cerebral function, the impulses being accompanied with consciousness of the condition and reasoning powers. They are variously subdivided, the

[1] S. v. Pike, 49 N. H. 399, 438.
[2] Davis v. U. S., 160 U. S. 469, 485; C. v. Rogers, 7 Metc. 500; Parsons v. S., 81 Ala. 577; Flanagan v. S., 103 Ga. 619; S. v. Peel, 23 Mont. 358.
[3] St. George v. Biddeford, 76 Me. 593.
[4] S. v. Pike, *supra;* S. v. Jones, 50 N. H. 369; Stevens v. S., 31 Ind. 485; Bradley v. S., *Ib.* 492; Parsons v. S., *supra.*
[5] S. v. Richards, 39 Conn. 591.
[6] Merritt v. S., 39 Tex. Cr. R. 70.
[7] S. v. Peel, *supra;* Flanagan v. S., *supra.*

most important type, from a legal standpoint being that designated as obsession-propensions, or obsessions properly so called, characterized by a fixed idea which has for its effect an irresistible tendency. Of this class are kleptomania and homicidal and suicidal impulses. Kleptomania, which is an uncontrollable propensity to steal, is now a well-recognized species of insanity and constitutes a complete defense to the charge of larceny.[8] Apparent theft may also be unconsciously committed in nearly every form of insanity.[9] Impulses to suicide and homicide are, more than any other kind, met with in most forms of insanity. Such impulses may also take the form of obsessions, or attacks of conscious, irresistible and distressing impulsions. The patients are so fully conscious of their condition, that they frequently ask to be locked up in order to be prevented from yielding to their impulse to kill, which may have for its object a friend or near relative, held in the closest affection by the patient.

Among the obsession-propensions are included erotomania, or impulsions to indecent acts, such as exposure of the person, and pyromania, or impulsion to set things on fire. Dr. Clevenger notes among these obsessions the destructive propensity to break windows and the impulse to strike others, to throw whatever may be in the hand, or to violent and absurd actions, (saltatorial spasm, *tic convulsif*).[10] The offense of blasphemy is represented by the form of obsession known as blasphematory mania, which consists in the impulse to repeat oaths and blasphemy.[11] Many actions, ordinarily attributed to moral turpitude, are, in reality, the offspring of cerebral affections of this kind.

It has been said that there exist as many varieties of obsessions as there are thoughts occurring in the human mind. A not uncommon form of impulsion, that of throwing one's self from a height, may account for a certain percentage of cases of supposed suicide. Impulsions to homicide and arson are frequently met with in epileptic insanity. Together with persons afflicted with delusions of persecution, epileptics are said to furnish the largest contingent of crimes due to insanity. The special characteristics of this form of insanity are a sudden, instantaneous, violent impulsion, frequently reproducing itself at more or less regular intervals, of which the patient retains no recollection after the attack.[12]

The possibility of what is called "double consciousness" is now well established. This condition sometimes leads to two separate existences ("double lives") for long periods, during one of which no remembrance of the former life may be preserved.[13] Many disappearances of the mysterious kind and many atrocious murders, sometimes bearing indications of systematic brutality, are ascribed by alienists to the condition of double consciousness in epilepsy. The notorious murders of Jack the Ripper are said to have been the acts of a London physician, who, in the interims of his epileptic-like mental attacks, led an irreproachable life.[14] Crimes may also at times be committed in a state of unconsciousness or semi-consciousness from sleep (somnambulism or somnolency). Such a condition, even though the perpetrator may be otherwise perfectly sane, constitutes a clear defense to a charge of crime.[15] Various acts of apparent atrocity, which at times stir up the indignation of whole communities, are, in reality, the deeds of madmen. Of such a nature is the annoyance of anonymous letter-writing, proneness to which occurs in some patients at the climacteric and in hysterical mania. Among general paralytics, the offenses of most frequent occurrence are theft, next indecent behavior, then forgery and breach of trust, and, more rarely, homicides and assaults. The deeds of such patients are generally committed without consciousness of the nature of the act. They will, for instance, openly take the goods of another person, often calling in the assistance of a stranger. The comparative frequency of these maladies, and the otherwise long list of mental alienations emphasize the necessity of enlightened and charitable judgment in cases of supposed criminality. Society should be protected against the gross mischiefs that may be perpetrated by an unfortunate, but exceedingly dangerous,

[8] Harris v. S., 18 Tex. App. 287; S. v. McCullough, 114 Iowa, 532.
[9] Clevenger Med. Jur. 101.
[10] Med. Jur. 853, 855.
[11] Regis Ment. Med. 275.
[12] Regis Ment. Med. 649.
[13] Clevenger Med. Jur. 42-43; 16 Med. Leg. Journ. 59.
[14] Clevenger Med. Jur. 1056.
[15] Reg. v. Tolson, 23 Q. B. D. 168, 187; Fain v. C., 78 Ky. 183.

class of persons; but the remedy indicated by considerations of expediency, as well as of humanity, is that of prompt sequestration in a proper asylum, if possible, in advance of any overt act of perhaps tragic dimensions, instead of imprisonment in penal institutions, where the morbid condition of the prisoner is frequently aggravated. An apparent exception to the rule as to the effect of insanity obtains in the case of drunkenness. Voluntary intoxication does not exempt from punishment, it matters not how far the perpetrator's faculties may be affected.[16] This doctrine is explained upon the theory, that the wrongful intent to drink coalesces with the wrongful act done while drunk, and makes the offense complete.[17] Involuntary intoxication, produced by the acts or contrivance of third persons, puts the person affected in the same situation as to criminal liability as ordinary insanity.[18] The same rule would, no doubt, apply in a case where a person ignorantly drank an intoxicating beverage. The fact of drunkenness, in whatever way produced, is always, however, to be taken into consideration in determining the existence of a particular state of mind material to the question of guilt.[19] Alcoholic insanity in its various forms excuses in the same manner as other insanity.[20]

It has been asserted by competent authority, that a great percentage of convictions, notably in cases of homicide, has been of undoubtedly insane persons.[21] The reasons for this are easily understood. Insane persons are not labeled, nor are they, off the stage, ordinarily distinguished by any marked peculiarities of appearance or extravagance of behavior. The diagnosis of insanity is in many instances matter of great difficulty. Cases are at times presented upon which real experts differ widely. In this matter, members of the legal profession should be charitable to the alienists, who differences are not greater than those often arising between different courts or even members of the same court. Moreover, the disagreements of expert witnesses must not always be laid at the door of medical science.

[16] Harris v. U. S., 8 App. D. C. 20.
[17] 1 Bishop New Cr. L. § 398 (3).
[18] 1 Hale, 32.
[19] Booker v. S., 156 Ind. 435.
[20] Reg. v. Davis, 14 Cox C. C. 563; U. S. v. Drew, Fed. Cas. 14, 993; Roberts v. P., 19 Mich. 401.
[21] 17 Med. Leg. Journ. 588.

A witness, in order to be allowed to give expert testimony, need not be an expert in the full acceptation of the term. In law, any physician who professes to have made a study of the subject of mental disease, or to have had some practice in the treatment or diagnosis of cases of insanity, is competent to give "expert testimony." The testimony of such "experts" stands upon the same legal footing as that of the most skilful and experienced alienists. It not infrequently happens, that the positive testimony as to a prisoner's insanity, given by a real alienist, who has devoted a lifetime to the study of his difficult specialty, is entirely discounted by the dogmatic counter-statement of an "expert," whose qualification consists in his right to append "M. D." to his name, and whose ideas of the symptoms of insanity are those of the man in the street. An assurance from a reputable "doctor," that he has carefully and conscientiously "examined" the prisoner, and even "watched" him when the prisoner was unaware of this, and has found nothing irrational in his speech or remarkable in his actions is apt to play sad havoc with the "theories" of the greatest specialists in mental disease. It sounds so much more like common sense! The crimes of the insane at times bear the stamp of their insane origin. An alleged assault or theft may be so ridiculous and devoid of the semblance of a motive or exciting cause as clearly to point to a demented condition of the perpetrator. The alleged offender may be an imbecile in regard to whose condition no intelligent person can be mistaken. On the other hand, it must be remembered, that many acts of the undoubtedly insane are planned and executed with all the proverbial "cunning of a madman." Certain classes of the insane not only display a marvelous degree of skill and cunning in the preparation, concealment and execution of their designs, especially in cases of homicide, but they may even invent shrewd and plausible excuses, accounting for their conduct in apparently the most rational manner. According to those most conversant with such matters, method and dissimulation are often strongly marked characteristics in the most severe forms of insanity. The logical and reasoning powers may be exceptionally strong in madmen, and the instinct of self-preservation may be in full activity. Persons undoubtedly insane may

even feign another form of insanity. It is related of Hastings, a paranoiac, who came of a family of degenerates, that on his trial for homicide he pretended to be demented or melancholic, and upon his acquittal boasted of the success of his "insanity dodge."

The determination of the nature of certain acts with reference to the mental condition of the perpetrator is often a matter of the utmost difficulty. The expression of opinion upon such cases may well be left to those whose learning and special training properly qualify them for the task. In such cases. often involving issues of life and death, in which, as seen, error is so likely, and its consequences are so sad, safety and wisdom are to be found in the rule, having the highest judicial sanction, that if, upon the whole evidence, a reasonable doubt exists as to the sanity of the accused, he must be acquitted.[22]

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[22] Davis v. U. S., *supra*.

NEGLIGENCE—DISCHARGE OF SNOW AND ICE ON SIDEWALK.

TREMBLAY v. HARMONY MILLS.

Court of Appeals of New York, June 27, 1902.

Where the owner of a building negligently maintained a leader from the roof of a building so as to discharge water on the sidewalk, by which ice accumulated thereon, and the walk became dangerous, he was liable to any person injured thereby.

Parker, C. J., and O'Brien and Gray, JJ., dissenting.

CULLEN, J.: Assuming the sufficiency of the appellant's exception to raise the point,—which may well be doubted,—the question presented on this appeal is whether the trial court erred in instructing the jury that, if the defendant was negligent in maintaining a leader from the roof of a building so as to discharge water on the sidewalk, by which ice was accumulated thereon, and the walk rendered dangerous, the plaintiff was entitled to recover. "At common law any act or obstruction which unnecessarily incommodes or impedes the lawful use of a highway by the public is a nuisance" (Ang. Highw., § 223), and any party who sustains a private or peculiar injury therefrom may maintain an action to recover the damages sustained. Wakeman v. Wilbur, 147 N. Y. 657, 42 N. E. Rep. 341. This is unquestionably the general rule. That the jury could have found that the discharge of water and drippings from the leader in winter weather, when the water so discharged was liable to freeze and form ice, rendered the sidewalk dangerous, and constituted an obstruction, and that the defendant was negligent in not carrying his leader under the sidewalk to the carriageway, seems to me quite plain. To exonerate the defendant from liability it must establish one of two propositions: First, that it had the lawful right to discharge the water which it had collected on the roof of its building upon the highway, regardless of the effect of that action upon the highway; or, second, that because the municipality was liable to any one injured by the defective character of its highway, no action could be maintained against the abutting owner, though his act may have created the danger or defect. I think that neither proposition can be sustained. "Highways are public roads, which every citizen has a right to use." Ang. Highw., § 2. "The primary and dominant purpose of a street is for public passage, and any appropriation of it by legislative sanction to other objects must be deemed to be in subordination to this use, unless a contrary intent is clearly expressed." Hudson River Tel. Co. v. Watervliet T. & Ry. Co., 135 N. Y. 393, 32 N. E. Rep. 148, 17 L. R. A. 674, 31 Am. St. Rep. 838. A *fortiori* the use of the highway without legislative sanction must be subordinate to the public right of safe passage. A highway is not laid out or maintained either as a drain or as a sewer. In urban districts the easement acquired by the public includes the right to lay sewers, water pipes, and similar conveniences under the highway. But the highway itself remains devoted to its paramount purposes of public travel, and no action can be maintained against the municipality because it does not construct a sewer in a street. Nor can any right of the appellant to discharge the water from the roof of its building be predicated of its ownership of the adjacent land. As between private owners, as long as one leaves his land in its natural condition he is not required to adopt measures to prevent the flowage of surface water from his premises on those of his neighbor. Vanderwille v. Taylor, 65 N. Y. 341. But when he puts a structure on his land a contrary rule prevails, and he must take care of the rain or snow that falls thereon, except in case of extraordinary storms. Bellows v. Sackett, 15 Barb. 96; Jutte v. Hughes, 67 N. Y. 267; Davis v. Tower Co., 171 N. Y. 336, 64 N. E. Rep. 4. Even when such an owner erects no structure he cannot "collect the surface water into channels, and discharge it upon the land of his neighbor to his injury. This is alike the rule of the civil and common law." Barkley v. Wilcox, 86 N. Y. 140, 40 Am. Rep. 519. "He may consume it, but must not discharge it to the injury of others." Forbell v. City of New York, 164 N. Y. 522, 58 N. E. Rep. 664, 51 L. R. A. 695, 79 Am. St. Rep. 666. The same principle obtains against the public authorities when they so grade a highway or construct a sewer as to collect water and discharge it to the injury of adjacent lands. Moran v. McClearns, 63 Barb. 185; Noonan v. City of Albany, 79 N. Y. 470, 35 Am. Rep. 540. Why is not the converse

of the proposition equally true? In the opinion of my Brother Gray, it is said of municipal corporations: "They owe the duty to the public of preventing the accumulation of ice from house conductors or leaders overhanging or near the sidewalk." Surely the abutting owner cannot be authorized to do that which it is the duty of the municipal authorities to prevent.

The fact that the city may have been liable to the plaintiff did not relieve the defendant from liability if the negligent or wrongful act of the latter created the dangerous condition of the highway. On the city there rested the duty of maintaining its streets reasonably safe for the passage of travelers. So far as the street may become unsafe from natural causes, that obligation is solely on the city; and, even if an ordinance imposes upon the abutting owners the duty of removing snow from the sidewalk, an action will not lie by a third party against an abutter for failure to comply with the ordinance. City of Rochester v. Campbell, 123 N. Y. 405, 25 N. E. Rep. 937, 10 L. R. A. 393, 20 Am. St. Rep. 760. In the case cited the snow which caused the injury had fallen upon the sidewalk, and the abutter had not contributed to its presence there. The doctrine of the case has no application where the affirmative act of the abutter creates the obstruction. On the contrary, "when corporations have been compelled to pay damages for a wrongful act perpetrated by another in public highways, they become entitled to maintain an action against such persons for indemnity from the liability which the wrongful act of the tort feasor has brought upon them." Opinion of Ruger, C. J., citing authorities, same case. It is contended that we are concluded by the decisions of this court in Wenzlick v. McCotter, 87 N. Y. 122, 41 Am. Rep. 358, and Moore v. Gadsden, 87 N. Y. 84, 41 Am. Rep. 352. We think they do not control the determination of the present case. In the Wenzlick case some broad statements were made by the learned judge writing the opinion which are in conflict with the views we have announced. These statements, however, were not necessary to the disposition of the case, and a careful reading of the opinion will show that the decision proceeded on the ground that the defendant had neither erected nor used the leader, and that, therefore, he was not liable for the creation of a nuisance, or its continuance, until he had been requested to abate it. In the Moore case the defendant had not changed the natural surface of the highway, from which it was alleged surface water or the drippings from melting snow had fallen on the sidewalk.

The judgment appealed from should be affirmed, with costs.

NOTE.—*Liability for the Discharge of Snow and Ice Upon the Highway from Artificial Structures on Land.*—The principal case has treated the question of a highway, so far as persons rightfully using the same are concerned, in the same way, as if it were adjacent land of another proprietor. The distinction is also drawn between flowage causing damage from land in its natural state and where such damage from results artificialstructures placed upon the land. The trend, or, I might say, the uniform doctrine of the cases is, that the structures need not themselves be classed as nuisances however certainly their construction may reasonably or probably effect nuisances. In some cases the nuisances may arise from negligence in the use or management of the structures; in others, because proper safeguards are not provided to prevent nuisance or damage. Tracing the line of decision in Massachusetts from Shipley v. Fifty Associates, 101 Mass. 251, we find that case announcing, that, if an owner is in control of the roof of a building and permits snow and ice to remain thereon for an unusual and unreasonable time after he had notice of the accumulation, he becomes liable for injury from the fall thereof on a traveler using the adjoining highway in a lawful way and exercising due care. This case was sent back to the lower court upon a reversal for involuntary nonsuit, and came again before the supreme judicial court and is reported in 106 Mass. at page 194. This time the court announced broadly, that maintaining a building, the roof of which was under the owner's control, so constructed, that snow and ice, collecting on the roof fromnatural causes, will naturally and probably fall into the adjoining highway, makes such owner liable to a traveler without other proof of negligence. This, it is to be observed, is a more drastic ruling than that made on the return of the case to the lower court, requiring prompt action for removal of snow and ice, and presuming notice to the owner from the very action of the elements. The court also in the later decision discusses the adjacent land proposition very similarly as is done in the principal case, and says: "A traveler lawfully using the highway has the same right to enjoy such use as if he were the owner in fee simple." In the case of Gray v. Boston G. L. Co., 114 Mass. 149, the owner sued a telegraph company to recover the damages he had paid upon a reasonable settlement of an action brought for injury from the fall of a chimney upon a traveler in the highway, the chimney being maintained in the unsafe condition caused by the stretching of wires to it without owner's permission. Recovery by the owner was sustained. The case of Swethurst v. I. C. Church, 148 Mass. 261, also reported in 2 L. R. A. 695 and there annotated, reaffirms the rule in Shipley v. Fifty Associates, *supra*, and announces, that it is of no consequence whether the building is of unusual construction or not. It would appear from the Massachusetts decisions, that the rule of control by the owner, at least as to the portion of the building from which the injury comes, is very strictly construed. Thus, in Khron v. Brock, 144 Mass. 516, the sole question in controversy was whether or not a contractor, who had left a piece of zinc so carelessly fastened to the roof, that it blew down on a street passer, was liable and *not* the defendant owner. It was held that this depended on whether the work he had undertaken was completed, about which there was conflict of testimony. A judgment against the owner was sustained. In Clifford v. Atlantic Cotton Mills, 146 Mass. 47, the fall of snow from a steep unguarded roof visited no liability on the landlord, even though he reserved the right to enter the premises to make repairs. It was said the tenant might have placed the guard on the roof, which was not repairs and such reservation did not put the landlord in control of the roof, and the tenant could have cleared the roof. "This decision" said the court "did not differ

from the case of Leonard v. Stover, 115 Mass. 86, where the tenant, who had agreed to do all needful repairs, was held liable." A late case from this State of Shipley v. Proctor reported in 50 N. E. Rep. at page 119 shows the rulings beginning with Shipley v. Fifty Associates are adhered to, as the only contention on the trial was whether plaintiff, who had slipped and fallen on the ice, was using due care. In this case the conductors from the building flowed water over the sidewalk, so when frozen it formed ridges, and whether these ridges were a public nuisance was held to be a question of fact.

The Maine Supreme Court quotes abundantly in Lee v. McLaughlin, 86 Me. 410, 26 L. R. A. 197, from Massachusetts decisions, and follows them, both on theory of liability and control, and exonerated the landlord, even as to a tenancy at will, saying the duty to keep the roof clear belonged to the tenant.

In Minnesota, however, it is said, that if an owner has erected a house with a roof, so constructed as from natural causes to inflict injury to a street passer, the question of tenancy has no relation to his liability, nor is it any defense that all diligence and care was exercised to remove the snow and ice, the fall of which had caused the injury complained of. Haimann v. Peirce, 40 Minn. 127. In Michigan, also, the court appears to differ from Clifford v. Atlantic Cotton Mills, *supra*, in holding, that the failure by the owner to put proper eaves-troughs or gutters on the building, where such failure would be likely to result in injury, established liability, not, however, from extraordinary or accidental circumstances. Underwood v. Waldron, 33 Mich. 232. There was no question of control or tenancy in this case.

In Missouri Court of Appeals the barrier question was considered, where the injury resulted from a traveler falling into a quarry near the edge of a highway, left unguarded. The quarry owner was held liable. Jelly v. Pieper, 44 Mo. App. 383. A decision of the supreme court of that state, Norton v. St. Louis, 97 Mo. 546, was relied on by defendant, in which it was sought to hold the owner of unimproved property abutting on the sidewalk, liable because contrary to ordinance he allowed snow and ice to remain on the sidewalk, and plaintiff was injured by falling, but recovery was denied. The court of appeals, observing the ruling of the supreme court, that a city could not shift its liability by such an an ordinance, though it might fine the property owner, said, if the property owner had negligently discharged water through pipes from a building on premises, which had there frozen, "a different case would have been presented and we apprehend that there would have been a different ruling."

I have cited other cases in this note than snow and ice cases, but the analogy in reasoning and decision is so close as to show the principle is the same. The two cases I have cited from the lawyer's reports annotated disclose no further variation, nor have I found any elsewhere, in decision than above instanced.

NEEDHAM C. COLLIER.

JETSAM AND FLOTSAM.

POEM IN DEDICATION OF DALLAS COUNTY COURT ROOM.

That lawyers are easily the most versatile of any class of our population is directly evidenced by the promptness and ease with which a lawyer can sling off a poem when the occasion demands. We are in receipt of some very appropriate verses written by L. V. Harpel of Adel, Iowa, and read at the dedicatory services of the new Dallas county court house The poem follows:

The law of compensation, justice,
Is strong to make the race industrious;
And while alone 'tis heartless cold,
Well mixed with love, 'tis finest gold.

In progress towards this high ideal
We build in beauty, temples real
A room like this doth move the heart
To find in law the better part.

Whoever enters here, must feel
The power of art, her mute appeal,
His sense of duty here will thrill
And make him just, whate'er his will.

We'll grind the grist of justice well;
The truth we'll seek, the truth we'll tell;
And rich nor poor, nor friend nor foe,
Within this hall we'll ever know.

Within these walls, a sacred shrine
Wherein we'll keep to endless time
Our Goddess, Justice, well enthroned:
We hail thee, Queen! to this thy home.

REQUIRING SOLICITORS TO BE GOWNED.

The days of formalism in England are not ended. Some of the courts, for instance, still require the solicitor to be gowned in the presence of the court. The following account of proceedings in the County Court of Brentford on the 11th inst., is given by the *Daily Mail:*

During the hearing of judgment summonses before his honor Judge Shortt, K. C., a solicitor, a stranger to the court, rose, ungowned, and said that he was for the plaintiff in the case under consideration.

For a few moments the judge gazed at him in silence, and then inquired, "Who and what are you?"

"I am a solicitor, sir," replied the lawyer in a tone of surprise.

"Oh, next case; this is struck out," remarked the judge.

For a few seconds the solicitor stood stupefied, and then ejaculated, "What is that for?"

"Don't interrupt the business of the court," said his honor.

It being privately explained to the solicitor that his honor made it a practice never to hear counsel or solicitors unless they were fully gowned, he exclaimed, "It is very hard?"

"What is that you say?" demanded the judge: "you had better be very careful; I can send you to prison."

The solicitor rose and walked out of court, saying in an audible "aside" as he went, "I should like to see you do it."

The judge, with outstretched hand, called out, "Usher, arrest that man."

Immediately two officers sprang forward to do his bidding, and in a few moments the solicitor, who had by this time left the court, was brought back.

"Don't hurt him, but take him to some room where he can think it over, said the judge.

As the officers were removing the solicitor to another part of the building, he exclaimed: "I am a good subject and a solicitor. I did not know the practice of this court."

"What is that?" demanded the judge.

"I did not know the practice of this court," faltered the solicitor.

"It is very easy to learn, and you should have done so," retorted the judge, adding impressively. "As long as I am here everyone shall keep order, from the highest counsel to the lowest litigant."

"I am very sorry," said the lawyer.

"You don't appear to be very sincere in your apologies; perhaps you had better be kept in custody a little longer," retorted the judge.

"I offer you my sincere apologies, then, your honor," said the solicitor after some hesitation.

"Humph! You had better repeat that," said Judge Shortt. The unfortunate lawyer did so, whereupon his honor remarked: "You can now quietly leave the court."

The solicitor walked out, declining to furnish his name to the reporters.

HUMORS OF THE LAW.

Industrious pupils are sometimes to be found in barristers' chambers. One such was recently intrusted with the duty of drawing a statement of defense in an action for personal injuries, strict injunctions being given him to deny everything. Weeks afterwards, when his pleading came to be examined, it was discovered that the faithful young man had denied, 1st, that the plaintiff was a gentleman, and secondly, that the injured leg in question was the leg of the plaintiff.

"I want to be sure I understand you rightly," said the lawyer, who was cross-examining the locomotive engineer. "At the time the accident happened to the plaintiff at what rate were you running? Please repeat your statement as to that particular."

"I had slowed down to about six miles an hour," replied the engineer.

"You are positive as to that, are you?"

"Yes, sir."

"You want the jury to understand that you had slowed down to six miles an hour, do you?"

"Yes, sir."

"Once again, you had slowed down to six miles an hour, had you?"

"Yes."

"Now, sir!" thundered the lawyer, rising to his feet and glaring fiercely at the witness, "did you not testify in your direct examination that you had slowed *up*?"

"Of course, but"—

"That will do, sir! Gentlemen of the jury, that's our case."

And the jurymen, without leaving their seats, brought in a verdict against the railway company.

BOOKS RECEIVED.

Second Edition. Shepard's Citations of All Cases in the Missouri Supreme Court Reports, which have had a Subsequent Citation. Copyright, 1902, by The Frank Shepard Company, New York. Showing Parallel References if a Case has been Affirmed, Criticised, Dismissed, Distinguished, Explained Harmonized, Limited, Modified, Overruled, Reversed, Questioned or Same Case. Also, the Exact Point in the Syllabus to which a Citation Refers. New York: The Frank Shepard Company, Law Book Publishers, 1902. Review will follow.

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCIDENT — Insurance.—Proof of Loss.—A refusal to pay a claim for a total disability under an accident policy would not relieve the insured from the necessity of making the proof necessary to establish an additional claim for partial disability.—Thornton v. Travelers' Ins. Co., Ga., 42 S. E. Rep. 287.

2. APPEAL AND ERROR — Bankruptcy.—A circuit court of appeals cannot revise on original petition, under the power given by Bankr. 1898, § 24b, the proceedings of a bankruptcy court in a plenary suit by a trustee against a third party, maintained in that court by consent of defendant. — *In re* Rusch, U. S. C. C. of App., Seventh Circuit, 116 Fed. Rep. 270.

3. APPEAL AND ERROR — Cross Appeal or Error.—If an appellee wishes to have rulings adverse to him reviewed, he must either take a cross appeal or cross assign error.—Long v. Campbell, Ala., 32 So. Rep. 591.

4. APPEAL AND ERROR — Grand Jury. — Though no objection to the organization of the grand jury be taken below, still, if that it is illegally organized affirmatively appear in the record, the court on appeal will be compelled to consider the question.—Hall v. State, Ala., 32 So. Rep. 750.

5. APPEAL AND ERROR — Grant of New Trial. — A judgment granting a first new trial will never be reversed unless the law and the facts demanded the verdict rendered.—Thornton v. Travelers' Ins. Co., Ga., 42 S. E. Rep. 287.

6. APPEAL AND ERROR — Joint Assignment of Error.—Joint assignments of error are bad, where not good as to all the appellants.—Killian v. Cox, Ala., 32 So. Rep. 738.

7. APPEAL AND ERROR — Sufficiency of Evidence.—Where defendant did not ask the direction of a verdict, the circuit court of appeals cannot review a judgment for plaintiff on the ground that the verdict is not supported by the evidence. — Kansas City S. Ry. Co. v. Billingslea, U. S. C. C. of App., Fifth Circuit, 116 Fed. Rep. 335.

8. APPEARANCE—Waiver of Objection. — Defendant, by appearing and agreeing to a continuance waives any objection to the return of process.—New River Mineral Co. v. Painter, Va., 42 S. E. Rep. 300.

9. ARREST — Officers of Corporation.—In trover against a corporation the sheriff cannot commit to jail the officers of defendant corporation, when not parties to the action.—Hall & Brown Woodworking Mach. Co. v. Barnes, Ga., 42 S. E. Rep. 276.

10. ASSIGNMENTS FOR BENEFIT OF CREDITORS — Bona fide in Inception. — A deed of assignment, *bona fide* in its inception, cannot be rendered fraudulent by collusion

between the grantor and the assignee after its execution. —Long v. Campbell, Ala., 32 So. Rep. 591.

11. ATTORNEY AND CLIENT — New Trial.—An attorney who has appeared and filed an answer for a defendant, with the express agreement that he will not try the case unless a retainer agreed upon is paid before the time for trial, has the right to withdraw from the case, or to fail to appear at the trial, if it is not paid. — Silver Peak Gold Min. Co. v. Harris, U. S. C. C., D. Nev., 116 Fed. Rep. 439.

12. BANKRUPTCY — Contempt. — A bankrupt ordered to turn over money, to his trustee under penalty of commitment for contempt, on evidence that satisfied the court that he had such money in his possession or control and concealed the same with intent to defraud his creditors.—*In re* Wilson, U. S. D. C., N. D. Ark., 116 Fed. Rep. 419.

13. BANKRUPTCY — Debts Created by Fraud. — A debt arising from an overpayment made to a bankrupt through mistake, which he refused to refund when advised of the mistake, is not one created by his fraud, within the meaning of Bankr. Act. 1898, § 17a. cl. 4, and is released by his discharge. — Western Union Cold Storage Co. v. Hurd, U. S. C. C., S. D. Iowa., 116 Fed. Rep. 442.

14. BANKRUPTCY—Exemptions.—A bankrupt may claim his exemptions, allowed by the laws of Georgia, from the proceeds of property which he had assigned for the benefit of creditors, after such proceeds have been recovered by his trustee. *In re* Talbott, U. S. D. C., N. D. Ga., 116 Fed. Rep. 417.

15. BANKRUPTCY — Fraudulent Conveyance. — Under Bankr. Act 1898, § 23, held, that a trustee may sue in a state court for property fraudulently conveyed.—Andrews v. Mather, Ala., 32 So. Rep. 738.

16. BANKRUPTCY—Hearing Before Referee.—A court of bankruptcy has jurisdiction to determine a controversy as to the ownership of property between the trustees of two different estates, both of which are being administered by such court.—*In re* Rosenberg, U. S. D. C., 116 Fed. Rep. 402.

17. BANKRUPTCY—Insolvency.—The federal courts will not recognize the rights of a state court to incumber the estate of a bankrupt by entering a judgment for the fees and expenses of its officers incurred in insolvency proceedings, after such proceedings were suspended by the bankruptcy proceedings. — *In re* Rogers, U. S. D. C., S. D. Ga., 116 Fed. Rep. 435.

18. BANKRUPTCY—Insolvency.—While the bankrupt law of the United States is in force, the insolvent law is suspended, even as to debtors owing less than $1,000, who cannot be put into bankruptcy by adverse proceedings, but may voluntarily invoke its provisions. — Littlefield v. Gay, Me., 52 Atl. Rep. 925.

19. BANKRUPTCY—Payment of Rent.— Payment of rent by receiver in bankruptcy for premises leased to bankrupt held not to release the latter from his lease. — Woodworth v. Harding, 77 N. Y. Supp. 969.

20. BANKRUPTCY— Payment of Second Note.— The payment of a note secured by an indorser within four months of the maker's bankruptcy, and while he is insolvent, but which fact is not known to the payee, is not a preference which the payee must surrender before proving another note, which is unsecured, against the estate of the maker. —*In re* Harpke, U. S. C. C. of App., 116 Fed. Rep. 295.

21. BANKRUPTCY—Preference.— The delivery to a bank of coin, legal tender notes, bank bills, indorsed checks and drafts, to be passed to the credit of an insolvent depositor, and to be subject to his draft, held to constitute a preference, within the bankruptcy act, which would have to be surrendered before the bank could prove the balance of its claims. — *In re* Stege, U. S. C. C. of App., 116 Fed. Rep. 342.

22. BANKRUPTCY — Prejudicial Error. — Under Bankr. Act 1898, §§ 60a, 60b, complaint in an action to set aside a transfer of property by a bankrupt held insufficient for failure to allege that the creditor would receive a greater percentage of its debt than others of the same class.—Schreyer v. Citizens' Nat. Bank, 77 N. Y. Supp. 494.

23. BANKRUPTCY—Rulings of Referee. — The ruling of a referee in bankruptcy, allowing the claim of a creditor, cannot be brought into the district court for review by filing exceptions thereto in that court. — *In re* Hawley, U. S. D. C., 116 Fed. Rep. 428.

24. BANKRUPTCY—Security for Costs. — A defendant in an action by a trustee in bankruptcy on a cause accruing after the appointment of the trustee is not entitled to security for costs, under Code Civ. Proc., § 3268.—Kelley v. Kremer, 77 N. Y. Supp. 515.

25 BANKRUPTCY—Suit by Trustee.—A suit by a trustee against a third person in respect to property claimed by both, brought in the district court, is an independent suit of which that court has jurisdiction only by defendant's consent; and an appeal therefrom must be taken under the general law and not under the bankruptcy act. —Stelling v. G. W. Jones Lumber Co., U. S. C. C. of App., Seventh Circuit, 116 Fed. Rep. 261.

26. BANKRUPTCY—Trading in Mercantile Pursuits. — A corporation is not subject to proceedings in involuntary bankruptcy, under Bankr. Act 1898, § 4b, as one engaged principally in trading or mercantile pursuits, because authorized to engage in such pursuits by its charter, when it has never in fact been so engaged.—*In re* Tontine Surety Co., D. N. Jer., 116 Fed. Rep. 401.

27. BANKRUPTCY—Transfer of Interest in Policy.—The equitable assignment of interest in fire insurance policies as collateral security for a debt more than four months prior to the debtor's bankruptcy did not create an unlawful preference, although the policies were not actually delivered until within such time, and after loss had occurred.—McDonald v. Daskam, U. S. C. C. of App., 116 Fed. Rep. 276.

28. BANKRUPTCY—Unrecorded Chattel Mortgages.—Under the law of Georgia that recording is not essential to the validity of chattel mortgages, unrecorded chattel mortgages given to a bank to secure present loans, made by the bank in good faith and without knowledge of the borrower's insolvency, create valid liens, which will be recognized and enforced by a court of bankruptcy in administering the debtor's estate, — *In re* Josephson, U. S. D. C., W. D. Ga., 116 Fed. Rep. 404.

29. BANKS AND BANKING—Lost Pass Book.— The negligence of a depositor in a savings bank in losing his book does not excuse the officers of the bank from the exercise of reasonable care to prevent payment to an impostor.—Ladd v. Augusta Sav. Bank, Me., 52 Atl. Rep. 1012.

30. BANKS AND BANKING—Ownership of Deposit.—The fact that money is deposited in a bank to the individual credit of the depositor shows *prima facie* that it belonged to him, but not conclusively so.— Bessemer Sav. Bank v. Anderson, Ala., 32 So. Rep. 716.

31. BILLS AND NOTES—Accomodation Acceptor.—Payee of a draft held to have the right to treat the acceptor of a draft as principal, in the absence of notice that he was an accommodation acceptor. — *In re* Stevens, Vt., 52 Atl. Rep. 1034.

32. BILLS AND NOTES — Indorser. — In an action by the holder of a note against the indorser the refusal of the court to strike out allegation of the complaint that plaintiff had recovered judgment against the maker, and that execution thereon had been returned, "No property found," was not reversible error. — Brown v. Fowler, Ala., 32 So. Rep. 584.

33. BILLS AND NOTES — Sale of Patent Right. — A note given for a patent right, but the consideration of which is not expressed on its face, is not void under the act of 1897.—Parr v. Erickson, Ga., 42 S. E. Rep. 240.

34. BROKERS — Commissions. — A real estate agent held not entitled to a commission for services voluntarily rendered in procuring a tenant for vacant premises.—McVickar v. Roche, 77 N. Y. Supp. 501.

35. BROKERS—Commissions.—Where a broker agrees to sell property, and finds a purchaser whose offer is accepted by the owner, it will be presumed, in an action for commissions, that the purchaser is able to carry out

the contract, and the burden is on the seller to show the contrary.—Stauffer v. Linenthal, Ind., 64 N. E. Rep. 648.

36. BUILDING AND LOAN ASSOCIATIONS—Insolvency.—When a building association goes into the hands of a receiver, a borrower is released from the terms of his loan, and there must be an equitable adjustment between him and the association.—Hall v. Stowell, 77 N. Y. Supp. 953.

37. CARRIERS—Action by Consignor.—Consignor of goods not accepted by consignee held to have no right of action against the carrier.—Levy v. Weir, 77 N. Y. Supp. 917.

38. CARRIERS—Agreement for Unloading.—Notwithstanding stipulation in bill of lading that the shipper shall unload the stock, the carrier undertaking to do this without notice to the shipper is liable for negligence therein.—Normile v. Oregon R. & Nav. Co., Oreg., 69 Pac. Rep. 928.

39. CARRIERS—Damages.—The measure of damages of a passenger who, buying a ticket to one point, is given one to a less distant point, where he is ejected, is not confined to the mere cost of transportation between the two points.—Kansas City, M. & B. R. Co. v. Foster, Ala., 32 So. Rep. 773.

40. CARRIERS—Intending Passengers Deterred.—It is negligence for a railway company to allow a freight train to block the track to the depot of the company when a passenger train is due at the station, so that intending passengers cannot reach the depot in time to purchase tickets.—Mayne v. Chicago, R. I. & P. Ry. Co., Okla., 69 Pac. Rep. 933.

41. CARRIERS—Liability to Passengers.—A passenger who is carried within about two miles of his station held not entitled to recover exemplary damages, where no wilfulness or rudeness was shown.—Fort v. Southern Ry., S. Car., 42 S. E. Rep. 196.

42. CARRIERS—Newsboys.—Where it has been the custom of a street car company to permit newsboys to board its cars to sell papers to passengers, it is not negligence to revoke such license and order such boys off the cars, when standing still or moving so slowly that they can get off with safety.—Indianapolis St. Ry. Co. v. Hockett, Ind., 64 N. E. Rep. 633.

43. CARRIERS—Punitive Damages.—Punitive damages held recoverable for wilfulness or gross negligence of conductor in carrying passenger beyond her station.—Birmingham Ry. Light & Power Co. v. Nolan, Ala., 32 So. Rep. 715.

44. CHARITIES—Wills.—A bequest to foreign and home missions carried on under the control of a certain church is in the nature of a trust which the courts will enforce.—Bruere v. Cook, N. J., 52 Atl. Rep. 1001.

45. CHATTEL MORTGAGES—Bill of Sale.—That the purchaser of personalty expected that the seller would ultimately repurchase the property from him did not change the bill of sale into a mortgage.—Fisher v. Stout, 77 N. Y. Supp. 945.

46. CHATTEL MORTGAGES—Construction of Contract.—A contract for the sale of the output of a lumber mill for the season held to be an executory contract for the manufacture and sale of lumber, and not a chattel mortgage necessary to be filed for record under the Wisconsin statute.—Stelling v. G. W. Jones Lumber Co., U. S. C. C. of App. 116 Fed. Rep. 261.

47. CHATTEL MORTGAGES—Sale by Mortgagor.—In trover by a mortgagee against a purchaser from the mortgagor, defendant may show a prior mortgage owned by another, and the consent of such other to the sale.—Beyer v. Fields, Ala., 32 So. Rep. 742.

48. COLLEGES AND UNIVERSITIES—Permanent Endowment Fund.—The permanent endowment fund created for the support of the State University is entitled to all the constitutional and statutory protection accorded the school fund.—Fisher v. Brower, Ind., 64 N. E. Rep. 614.

49. COMMERCE—License Tax.—An ordinance imposing a license tax on railroad held not to interfere with interstate commerce.—Nashville, C. & St. L. Ry. Co. v. Alabama City, Ala., 32 So. Rep. 731.

50. CONSTITUTIONAL LAW—Repair of Streets.—St., 1898, ch. 578, providing that street railroads shall not be required to repair any portion of the streets or highways, is not unconstitutional, as impairing contracts, in relieving the roads from such obligations imposed on them by a city in granting locations to them.—City of Worcester v. Worcester Consol. St. Ry. Co., Mass., 64 N. E. Rep. 581.

51. CONTEMPT—Appeal.—An appeal may be taken by the state in proceedings for indirect contempt, under Burns' Rev. St., 1901, § 1915.—State v. Rockwood, Ind., 64 N. E. Rep. 592.

52. CONTRACTS—Action for Breach.—A lessee of convicts, who has a right to sublet them, who employs another to procure a sublessee, held liable on performance of contract by such other.—Bush v. Matthew, Ga., 42 S. E. Rep. 240.

53. CONTRACTS—Restraint of Trade.—A covenant by an employee not to engage in, or become interested in, business carried on in competition with his employer during the term for which he was employed, held not valid as in restraint of trade.—Harrison v. Glucose Sugar Refining Co., U. S. C. C. of App., Seventh Circuit, 116 Fed. Rep. 304.

54. CONVERSION—Proceeds of Real Estate.—Proceeds of real estate inherited by an incompetent, and sold by his committee, are real estate in the hands of his administratrix.—*In re* Reeve, 77 N. Y. Supp. 986.

55. CORPORATIONS—Foreign Judgment.—A creditor of a Kansas corporation, who has obtained a judgment against it in that state, may sue in another state a stockholder residing there, and enforce his liability under the laws of Kansas.—Pulsifer v. Greene, Me., 52 Atl. Rep. 921.

56. CORPORATIONS—Joint Adventure.—A corporation, though it cannot bind itself as a partner, may bind itself to share in the profits of contracts it is authorized to perform.—L. J. Mestier & Co. v. A. Chevalier Paving Co., La. 32 So. Rep. 520.

57. COSTS—On Appeal.—On appeal of three cases at law as one case, prevailing party may tax appeal costs for case and exceptions and argument in each case.—Baker v. Irvine, S. Car., 42 S. E. Rep. 194.

58. CRIMINAL EVIDENCE—Adultery.—Where a man and a woman were separately indicted for living in adultery, the conviction of the man would not be any evidence of the woman's guilt.—Campbell v. State, Ala., 32 So. Rep. 635.

59. CRIMINAL LAW—Venire.—That 12 of the special venire are engaged in consideration of another case is no ground for objection to going to trial.—Johnson v. State, Ala., 32 So. Rep. 724.

60. CRIMINAL TRIAL—Homicide.—In a capital case it is not required that there shall be an interposition of a plea before the special jurors are drawn.—Ferguson v. State, Ala., 32 So. Rep. 760.

61. CRIMINAL TRIAL—Impartial Trial.—Where, at a trial for rape, the prosecuting witness became much excited, and began upbraiding the defendant, and her husband took hold of a chair as if to strike him with it, and the crowd became much excited, moving toward where the defendant was sitting, held, the accused did not have the fair and impartial trial contemplated by law.—Collier v. State, Ga., 42 S. E. Rep. 226.

62. CRIMINAL TRIAL—Plea in Abatement.—A special plea in abatement, alleging the pendency of another indictment for the same offense, is not good when it shows that a *nolle prosequi* had been entered to the other indictment.—Jones v. State, Ga., 42 S. E. Rep. 271.

63. DEATH—Presumption.—Small boy sent West in 1868, and not heard from since, presumed to be dead.—*In re* Barr's Estate, 77 N. Y. Supp. 935.

64. DEATH—Presumption.—In an action on a benefit certificate, it was held error, under the evidence, to instruct that there was a presumption of death, in the absence of rebutting circumstances.—Winter v. Supreme Lodge K. P., Mo., 69 S. W. Rep. 662.

65. DEDICATION—Appointment of Trustees.—A grant of land for cemetery purposes will not be allowed to fail because the grantee is incapable of taking; but the court

will appoint trustees, unless the control of the property is placed elsewhere by statute. — Hunt v. Tolles, Vt., 52 Atl. Rep. 1042.

66. DEEDS — Cemeteries.—A grant to the "inhabitants" of a community held too indefinite to confer any title upon the individuals of the community. — Hunt v. Tolles, Vt., 52 Atl. Rep. 1042.

67. DEEDS — Construction. — The word "heirs" as used in a limitation of real and personal property, construed to mean "children," as a limitation of personalty on indefinite failure of issue was void at common law.—Findley v. Hill, Ala., 32 So. Rep. 497.

68. DEPOSITIONS — Open Commission.—Plaintiff's claim that certain witnesses residing in another state were hostile held not sufficient ground to justify the granting of an open commission to examine them. — Thalmann v. Importers' & Traders' Nat. Bank, 77 N. Y. Supp. 886.

69. DISORDERLY CONDUCT—Shooting a Slingshot.—The shooting of a slingshot in a city held not disorderly conduct. — Kinney v. Town of Blackshear, Ga., 42 S. E. Rep. 231.

70. DIVORCE — Alimony. — A foreign decree in divorce, awarding alimony, held conclusive evidence of a debt due from defendant at time of rendition. — McFadden v. McFadden, Ala., 32 So. Rep. 719.

71. DIVORCE — Marriage within Five Months. — Under Civ. Code, §§ 61, 91, where a woman within five months after obtaining a divorce in California was married in Nevada to a citizen thereof in accordance with its laws, the marriage was valid in California. — *In re* Wood's Estate, Cal., 69 Pac. Rep. 900.

72. DOWER — Action to Recover. — Where alienee has elected to pay widow interest on one-third of the value of the land, under Code, § 2278, she is entitled to have her dower assigned on his failure to pay the interest. — Dickenson v. Gray, Va., 42 S. E. Rep. 298.

73. EJECTMENT — Parties.—Where, on the death of the owner of land, one of his heirs denied possession to the other heirs, each of them was entitled to sue, and it was not material whether all of the excluded heirs joined.—Butler v. Butler, Ala., 32 So. Rep. 579.

74. ELECTIONS — Illegal Voting. — In an indictment for illegal voting at an annual town meeting for the choice of town officers, it is sufficient if the indictment alleges the meeting to be the annual meeting.—State v. Gilman, Me., 52 Atl. Rep. 920.

75. EMINENT DOMAIN — Alteration of Street Grade.—Abutting owner can recover for change of grade of street, though his buildings were not originally erected in accordance with the grade established by the engineer.—Mauldin v. City Council of Greenville, S. Car., 42 S. E. Rep. 202.

76. EQUITY — Defective Complaint. — Where a bill was capable of amendment by striking out a defective disjunctive averment, a motion to dismiss it for want of equity was properly overruled. — Taylor v. Dwyer, Ala., 32 So. Rep. 509.

77. EQUITY—Remedy at Law.—A federal court of equity is not deprived of jurisdiction because complaint may be given, by the statutes of a state, a legal remedy in its courts which he does not have at the common law.—Peck v. Ayers & Lord Tie Co., U. S. C. C. of App., Sixth Circuit, 116 Fed. Rep. 273.

78. ESTOPPEL—Action to Quiet Title.—Defendants, having introduced oral evidence of a judgment and payment thereof, were precluded from questioning collaterally the jurisdiction of the court rendering the judgment. — Bevor v. Fields, Ala., 32 So. Rep. 742.

79. ESTOPPEL — Mortgage. — Where, in an action to require a mortgage to be surrendered, defendant claims solely through plaintiff under the mortgage, plaintiff's interest need not be proved. — Sheats v. Scott, Ala., 32 So. Rep. 573.

80. EVIDENCE — Car Inspectors.—Men without scientific knowledge or practical experience in moving cars, employed as car inspectors, do not thereby become qualified as experts in the matter of the causes which may operate to derail a car.—Budge v. Morgan's L. & T. R. & S. S. Co., La., 32 So. Rep. 545.

81. EVIDENCE—City Engineer.—Mayor of city can testify as to who held position of city engineer, without producing written appointment. — Mauldin v. City Council of Greenville, S. Car., 42 S. E. Rep. 202.

82. EVIDENCE — Depositor's Passbook. — A passbook given to a depositor in a savings bank held admissible against the bank, and *prima facie* evidence that the bank is indebted for the balance shown therein. — Atlanta Trust & Banking Co. v. Close, Ga., 42 S. E. Rep. 265.

83. EVIDENCE — Duty of Telegraph Company. — The court will take judicial notice that it is the duty of a telegraph company to exercise care to prevent its wires from obstructing a public road.—Postal Tel. Cable Co. v. Jones, Ala., 32 So. Rep. 500.

84. EVIDENCE — Fires from Locomotives. — Opinion of experienced engineer that locomotive, properly equipped, should not emit sparks of a certain size, held admissible. —Louisville & N. R. Co. v. Marbury Lumber Co., Ala., 32 So. Rep. 745.

85. EVIDENCE — General Report of Death. — A general report that one is dead, communicated to the party's family, is sufficient to render the testimony of such party admissible, as being of one deceased, though it is not offered *de bene*.—Welch v. New York, N. H. & H. R. Co., Mass., 64 N. E. Rep. 695.

86. EVIDENCE — Genuineness of Signature.—Where the genuineness of the signature to a note was disputed, a certain instrument signed with the name of the maker of the note held inadmissible for purposes of comparison.—Hobart v. Verrault, 77 N. Y. Supp. 463.

87. EVIDENCE — Leak in Pipe.—Evidence in suit against a natural gas company for damages alleged to have been caused by a leak in defendant's main held competent in rebuttal.—Logansport & W. Val. Gas Co. v. Coate, Ind., 64 N. E. Rep. 638.

88. EXECUTION — Title Under Judicial Sale. — Title to realty acquired under a judicial sale cannot be collaterally assailed for inadequacy of the purchase price.—Worthington, v. Miller, Ala., 32 So. Rep. 748.

89. EXECUTORS AND ADMINISTRATORS—Claims Against Estate. — In order to maintain an action on a rejected claim against a decedent's estate, it is not necessary to set out therein the evidence upon which the claimant expects to recover.—Goltra v. Penland, Oreg., 69 Pac. Rep. 925.

90. EXECUTORS AND ADMINISTRATORS—Faithless Wife.—Civ. Code, art. 3252, giving a widow left in necessitous circumstances a right to $1,000 from her husband's succession, does not apply to a faithless wife who has abandoned her husband. — Richard v. Lazard, La., 42 So. Rep. 559.

91. EXECUTORS AND ADMINISTRATORS — Fraud.—Complaint against an administrator held to state a cause of action, under Burns' Rev. St. 1901, § 2558, providing for the setting aside of a final settlement for fraud.—Kingan & Co. v. Hawley, Ind., 64 N. E. Rep. 620.

92. EXECUTORS AND ADMINISTRATORS—Validity of Sale. —A purchase by an administrator at his own sale renders the entire sale void at the instance of any one interested.—Moore v. Carey, Ga., 42 S. E. Rep. 268.

93. EXEMPTIONS — Fraudulent Conveyance. — A plea of exemption was not available against a judgment creditor in tort seeking to have a transfer of property set aside as fraudulent.—Taylor v. Dwyer, Ala., 32 So. Rep. 509.

94. FERRIES — Counties. — A county held to have no authority to establish and operate a ferry partly without the county.—Johnston v. Sacramento County, Cal., 69 Pac. Rep. 962.

95. FIXTURES—Erection of Building.—Where a building is placed upon land of another, to be used by the builder during the pleasure of the landowner, the ownership of the structure remains in the builder.—Salley v. Robinson Me., 52 Atl. Rep. 930.

96. FRAUDS, STATUTE OF — Oral Agreement. — An oral agreement to procure certain shares of stock and transfer them to defendant, on his promise that a corporation would

purchase certain land belonging to him, held void as within the statute of frauds.—Crafton v. Carmichael, Ind., 64 N. E. Rep. 627.

97. FRAUDS, STATUTE — Sale of Land. — An oral agreement for the conveyance of land upon the repayment of a loan with interest, is an agreement for sale of land, within the statute of frauds. — Hurley v. Donovan, Mass., 64 N. E. Rep. 685.

98. FRAUDULENT CONVEYANCES — Knowledge of Vendee —To avoid a sale by an insolvent in payment of a pre-existing debt, it must be shown that creditor participated in the fraudulent intent of the grantor.—Grainger v. Erwin, Neb., 91 N. W. Rep. 592.

99. FRAUDULENT CONVEYANCES — Reimbursement of Grantee. — Where the grantee in a deed fraudulent as to the creditors has paid a valid mortgage on the land, in a decree setting aside such deed the grantee should be awarded a lien for the amount so paid. — Ackerman v. Merle, Cal., 69 Pac. Rep. 983.

100. FRAUDULENT CONVEYANCES — Value of Equity of Redemption. — Where a debtor conveys to his wife property incumbered by valid mortgages, and the question is whether the equity was of any value, the standard of value is the value at a fair cash sale, not a forced sale.—Berla v. Meisel, N. J., 52 Atl. Rep. 999.

101. GRAND JURY — Conduct of Prosecuting Attorney.—That the prosecuting attorney and presiding judge advised the grand jury to find an indictment, or gave information concerning the law of the case, is not a proper subject for a plea in abatement.—Hall v. State, Ala., 32 So. Rep. 750.

102. HIGHWAYS—Cutting trees. — Complaint of abutting ower for cutting trees in highway should allege plaintiff is the ower of the fee of the highway and that the trees were on his side of it. — Western Union Tel. Co. v. Krueger, Ind., 64 N. E. Rep. 635.

103. HIGHWAYS—Order Establishing.—On an appeal in the circuit court from an order establishing a highway, the case stands for trial as other causes; the petition and report of reviewers being considered the complaint, and the remonstrance as the answer.—Raab v. Roberts, Ind., 64 N. E. Rep. 618.

104. HOMICIDE—Evidence.—Where accused, on trial for murder, has been allowed to prove a declaration by the decedent that he did not know who shot him, he cannot complain at exclusion of evidence that decedent stated that, if he shot him, it was an accident.—Ogletree v. State, Ga., 42 S. E. Rep. 255.

105. HUSBAND AND WIFE—Claim for Rent.—Where husband and wife live together in her house, there is no implied agreement that he will pay rent.—Gardner v. Gardner, Ind., 64 N. E. Rep. 637.

106. HUSBAND AND WIFE—Mortgage of Wife's Property.—Where a wife executed a mortgage of her property to secure her husband's debt, believing that the mortgage was on his property, she is not estopped to assert the invalidity of the mortgage.—Russell v. Peavy, Ala., 32 So. Rep. 492.

107. HUSBAND AND WIFE — Tenancy in Common. — A transfer of real estate by warranty deed to a man and wife conveys to each an undivided one-half interest in the fee simple.—Helvie v. Hoover, Okla., 69 Pac. Rep. 958.

108. INDICTMENT AND INFORMATION—"Alias."—Where, in an indictment, the name of accused is given, followed by "*alias*" and another name "*alias*" stands for "*alias dictum*," and indicates, not that the person referred to is called by both names, but that he is called by one or the other.—Ferguson v. State, Ala., 32 So. Rep. 760.

109. INDICTMENT AND INFORMATION—Former Jeopardy. —Former jeopardy furnishes no ground for quashing an indictment, but should be specially pleaded, before the plea of not guilty.—Johnson v. State, Ala., 32 So. Rep. 724.

110. INJUNCTION—Gas Companies.—A gas company held not deprived of right, under Const. art. 11, § 19, to lay gas pipes in street, though purposing to supply gas for other purposes than light.—*In re* Johnston, Cal., 69 Pac. Rep. 973.

111. INJUNCTION—Parties.—An injunction against a corporation restraining it from disposing of its property is binding upon its officers and agents, and they are not necessary parties to a bill for such relief.—Sidway v. Missouri Land & Live Stock Co., U. S. C. C., S. D. Mo., 116 Fed. Rep. 381.

112. INJUNCTION—Ultra-Vires Municipal Act.—An injunction will not issue at the instance of a taxpayer to restrain an *ultra vires* municipal act which can in nowise injuriously affect him.—Blanton v. Merry, Ga., 42 S. E. Rep. 211.

113. INSANE PERSONS—Action Against.—An idiot from birth cannot be sued on contract for past maintenance.—Bicknell v. Spear, 77 N. Y. Supp. 930.

114. INSOLVENCY — Bankruptcy.—A petition in insolvency being ineffective during the pendency of the United States bankrupt law, the appointment of an assignee under such proceedings is void.—Littlefield v. Gay, Me., 52 Atl. Rep. 925.

115. INSOLVENCY—Foreign Creditors.—A discharge in insolvency is void as against nonresident creditors who have not made themselves voluntary parties by proving claims, accepting dividends, or otherwise.—Swift v. Winchester, Me., 52 Atl. Rep. 1017.

116. INSURANCE — Construction of By-Laws.—By-laws enacted by a fraternal insurance order will, in the absence of a clearly expressed intention to the contrary, be construed to have a prospective operation.—Sovereign Camp Woodmen of the World v. Thornton, Ga., 42 S. E. Rep 236.

117. INSURANCE—Waiver by Agent.—It is a reasonable provision in a policy that no agent of the company shall have power to waive a stipulation of warranty, unless indorsed thereon, or added thereto.—Liverpool & L. & G. Ins. Co. v. T. M. Richardson Lumber Co., Okla., 69 Pac. Rep. 938.

118. INTOXICATING LIQUORS—Public Nuisance.—A dispensary where intoxicating liquors are openly sold under color of lawful authority, though in violation of law, is not a "blind tiger," subject to be abated or enjoined under Act Dec. 19, 1899.—Cannon v. Merry, Ga., 42 S. E. Rep. 274.

119. JUDGMENT—Res Judicata.—A decree that an assessment for a certain year is illegal is not *res judicata* as to legality of assessment for another year, though all the circumstances are the same.—Gittings v. City of Baltimore, Md., 52 Atl. Rep. 937.

120. JUDICIAL SALES—En Masse.—Mills and machinery of great value having been sold *en masse* for a very inadequate price, held, that a resale, so that they might be offered separately, was proper.—Ryan v. Wilson, N. J., 52 Atl. Rep. 998.

121. JURISDICTION — Ancillary Suit.—A bill in a federal court between citizens of the same state, of which the court has jurisdiction only by reason of its ancillary character, cannot be retained after the suit on which it is dependent has been dismissed.—Cabaniss v. Reco Min. Co., U. S. C. C. of App., 116 Fed. Rep. 318.

122. JURY—Juror on Defendant's Bail.—The court may on its own motion excuse from sitting on the jury a person who is on defendant's bail for his appearance. — Scott v. State, Ala., 32 So. Rep. 623.

123. JUSTICES OF THE PEACE— Pleadings. — Where defendant before a justice fails to defend at the first term and loses his right so to do, plaintiff does not by contesting the merits at a subsequent term, waive the right on appeal to object to the filing in the superior court of an answer.—Hodges v. Rogers, Ga., 42 S. E. Rep. 251.

124. LIBEL AND SLANDER — Fatal Variance. — Where declaration for slander alleged in the first count that 'M stole the pin," and the evidence was "M stole the buckle," held, that the variance was fatal. — Kimball v. Page, Me., 52 Atl. Rep. 1010.

125. LIBEL AND SLANDER—Privileged Communications. —Violent and abusive language in a complaint to a mayor as to conduct of a policeman may destroy the privileged

character of the communication.—Tyree v. Harrison, Va., 42 S. E. Rep. 295.

126. LIMITATION OF ACTIONS — Removal of Bar. — An agreement by a creditor not presently to sue is sufficient consideration for a waiver of limitations by the debtor.—Pollak v. Billing, Ala., 32 So. Rep. 639.

127. MASTER AND SERVANT — Assumption of Risk. — A servant who, with full knowledge that the place where he is working is unsafe, remains in the service and assists in making it safe, while so engaged, assumes the risks from the known dangers, and those which he has an equal opportunity with the master to see and is as competent to understand.—Kansas City S. Ry. Co. v. Billinslea, U. S. C. C. of App., Fifth Circuit, 116 Fed. Rep. 335.

128. MASTER AND SERVANT—Contract of Employment.—Where a workman has agreed to do work to the satisfaction of his employer, the doing of the work in a manner unsatisfactory to the employer is a breach of the contract.—Gwynne v. Hitchner, N. J., 52 Atl. Rep. 997.

129. MASTER AND SERVANT — Dangerous Machinery.—Acts 1899, p. 234, § 9, Burns' Rev. St. 1901, § 7087i, declaring it a misdemeanor to leave dangerous machines unguarded, held to give a right of action to a servant injured by a violation thereof. — Monteith v. Kokomo Wood Enameling Co., Ind., 64 N. E. Rep. 616.

130. MASTER AND SERVANT—Defective Appliances.—The duty of a master to see that the appliances for the servants are kept in repair must be continually performed by him or by one selected by him for that purpose. — Budge v. Morgan's L. & T. R. & S. S. Co., La., 32 So. Rep. 535.

131. MASTER AND SERVANT—Evidence.— Where a servant is killed, owing to the fall of an elevator, and plaintiff claims that the master was negligent in not having it inspected, plaintiff must prove that an inspection would have disclosed the defect. — Stackpole v. Wray, 77 N. Y. Supp 633.

132. MASTER AND SERVANT—Injury to Employee. — An instruction that an employee could not recover if by any means whatever he could have avoided the consequences of his master's negligences is more favorable to defendant than is warranted by the law. — Atlanta Ry. & Power Co. v. Bennett, Ga., 42 S. E. Rep. 244.

133. MASTER AND SERVANT—Switch Signals.—A Switchman held to have the right to assume that a towerman to whom he gave a signal would act upon it correctly, and that no train would be run in on a track not called for in the signal.—Welch v. New York, N. H. & H. R. Co , Mass., 64 N. E. Rep. 695.

134. MINES AND MINERALS —Ore Vein. — Where, in an action to restrain defendants from taking ore from plaintiff's ground, defendants had introduced evidence that their vein could be traced to the point where they were working, evidence by plaintiff that the vein was not continuous was proper rebuttal.— Anaconda Copper Min. Co. v. Heinze, Mont., 69 Pac. Rep. 909.

135. MONOPOLIES—Illegality of Corporation. — The objection that a corporation is a trust or monopoly organized and existing in violation of law cannot be urged by one who has voluntarily entered into a contract with it which is independent of, and has no relation to, its unlawful purposes, for the purpose of avoiding such contract.—Harrison v. Glucose Sugar Refining Co., U. S. C. C. of App., Seventh Circuit, 116 Fed. Rep. 304.

136. MORTGAGES — Assignee. — A corporation being assignee of mortgage, affidavit to mortgage claim, in proceedings under it, may be made by its treasurer. — McCausland v. Baltimore Humane Impartial Soc., Md., 52 Atl. Rep. 918.

137. MORTGAGES—Foreclosure. — Sale under power in mortgages is a foreclosure, and cuts off equity of redemption.—Woodruff v. Adair, Ala., 32 So. Rep. 515.

138. MUNICIPAL CORPORATIONS — Contract with City Officer.—An election commissioner of St. Louis held not a city officer so as to prevent the corporation of which he is president making a contract with the city.—State v. Meier Mo., 69 S. W. Rep. 668.

139. MUNICIPAL CORPORATIONS—Removal of City Officer. —City officer, after removal, not having sought reinstatement by a formal demand and appropriate legal proceedings, could not maintain an action for his salary.—Cote v. City of Biddeford, Me., 52 Atl. Rep. 1019.

140. MUNICIPAL CORPORATIONS — Vault in Street — One by constructing a vault into a street, and maintaining it without a permit, when ordinances require one, acquires, against the public, only a revocable license. — Deshong v. City of New York, 77 N. Y. Supp. 563.

141. MUNICIPAL CORPORATIONS — Water Frontage Assessment. — Sp. Laws 1885, c. 110, §§ 26, 27, providing for water frontage assessments, is not a violation either of the state or the federal constitution. — Ramsey County v. Trustees of Macalester College, Minn., 91 N. W. Rep. 484.

142. NEW TRIAL — Disputed Facts. — On a motion for a new trial all disputed facts must be considered found in favor of the party in whose favor verdict was given.—Clark v. Lyons, 77 N. Y. Supp. 967.

143. NEW TRIAL — Newly Discovered Evidence. — On a new trial for newly discovered evidence, it must be such that it seems probable that the result will be changed, or it must appear that injustice would be done if it was refused. — Parsons v. Lewiston, B. & B. St. Ry., Me., 52 Atl. Rep. 1006.

144. NUISANCE — Liability of Landlord. — A board of health cannot give the owner of premises rented to another a right of re-entry, so as to make him chargeable with maintaining a nuisance created by the tenant.—Eastlock v. Local Board of Health of West Deptford Tp., N. J., 52 Atl. Rep. 999.

145. PARENT AND CHILD—Emancipation.—That a minor son received his own wages, paying his parents' board and retaining the balance, shown an emancipation. — Berla v. Meisel, N. J., 52 Atl. Rep. 999.

146. PARTNERSHIP—Agency.—Where, in a suit against a "company," the written contract showed it was made with an individual, and there was no proof of agency, there could be no recovery.—Rothrock Const. Co. v. Port Gibson Mfg. Co., Miss., 32 So. Rep. 484.

147. PARTNERSHIP — Customer. — Where one person owns a saw-mill, and another furnishes the mill with logs, and each is to have one-half proceeds thereof, they are not partners.—Hodges v. Rogers, Ga., 42 S. E. Rep. 251.

148. PATENTS — Combination of Old Elements.—A combination which is not only of old parts, but of old results without the addition of any new and distinct function as a result of their new association, is not patentable. — Goodyear Tire & Rubber Co. v. Rubber Tire Wheel Co., U. S. C. C. of App., Sixth Circuit, 116 Fed. Rep. 368.

149. PHYSICIANS AND SURGEONS—Osteopathy.—Persons practicing osteopathy held practicing medicine, within Civ. Code, § 3261, and Cr. Code, § 5338. — Bragg v. State, Ala., 32 So. Rep. 767.

150. POST OFFICE — Blackmail.—The sending of a letter through the mails threatening to publish charges against the person to whom it is addressed, accusing him of the commission of crimes unless he pays a sum demanded, is a criminal offense.—Horman v. United States, U. S. C. C. of App., Sixth Circuit, 116 Fed. Rep. 350.

151. PRINCIPAL AND SURETY — Contribution.—The right to contribution by the surety on the bond of a public officer against the sureties on other bonds may extend to costs of defending a suit on the bond. — Carter v. Fidelity & Deposit Co. of Maryland, Ala., 32 So. Rep. 632.

152. PROCESS—Amendment of Trial.—Where defendant is served with a process in which an entirely different person is named as defendant, the name of the real defendant cannot, by amendment at the trial term be substituted. — Neal-Millard Co. v. Owens, Ga., 42 S. E. Rep. 256.

153. RAILROADS — Walking on Tracks.—Person walking on railroad track held a trespasser, though persons were accustomed to walk there without objection. — Louisville & N. R. Co. v. Mitchell, Ala., 32 So. Rep. 735.

154. RECEIVERS — Appointment Before Trial. — The power to appoint a receiver before trial is one which

should be exercised with great care; and such appointment should rarely be made without notice, and never unless a clear case of imperious necessity is shown where protection can be afforded in no other way. — Cabaniss v. Reco Min. Co., U. S. C. C. of App., Fifth Circuit, 116 Fed. Rep. 318.

155. RELIGIOUS SOCIETIES—Expelled Member.—Where a trustee of an incorporated church is expelled from ecclesiastical membership therein, the court has no jurisdiction, under Code, §§ 1302-1305, to compel his restoration to such membership by *mandamus*.—Hundley v. Collins, Ala., 32 So. Rep. 575.

156. REMOVAL OF CAUSES—Existence of Controversy.—It is not essential to the right of a defendant to remove a cause that an answer should be filed in the state court disclosing the existence of a controversy, where the petition for removal states that there is a controversy. —Wilcoxen v. Chicago, B. & Q. R. Co., U. S. C. C., S. D. Iowa, 116 Fed. Rep. 444.

157. SALES—Election of Remedies. — Where a machine is sold with a warranty as to fitness, on failure of the warranty the purchaser may keep the machine and recover the damages, or may return the machine and recover the consideration paid. — D. M. Osborne & Co. v. Walther, Okla., 69 Pac. Rep. 953.

158. SHERIFFS AND CONSTABLES — Trover Against Corporation.—A sheriff cannot be held liable by plaintiff in trover against a corporation for failure to arrest the officer or to take a bond from the defendant for the property when it declines to give one. — Hall & Brown Woodworking Mach. Co. v. Barnes, Ga., 42 S. E. Rep. 276.

159. STREET RAILROAD— Contributory Negligence. — A driver held guilty of contributory negligence in attempting to cross in front of a motor car running at 20 miles an hour, and not more than 50 feet away. —Seggerman v. Metropolitan Ry. Co., 77 N. Y. Supp. 905.

160. SUPREME COURTS—Jurisdiction. — It is only when the lower court holds a statute unconstitutional that the cause may be appealed to the supreme court, where the matter in dispute is below its appellate jurisdiction. — State, *ex rel.*, McMain v. Town of Pollock, La., 32 So. Rep. 558.

161. TAXATION—Assessment.—An assessment is deemed to have been made on the day following the last date on which taxpayers were notified to bring in an account of their ratable estates.—Warwick & Coventry Water Co. v. Carr, R. I., 52 Atl. Rep. 1090.

162. TAXATION — Increasing Assessment. — It was not necessary for an assessor, in preparing his assessment rolls, to give previous notice to the owner of certain property that he intended to raise the assessment over that of the previous year. — Legendre v. Assessor of Parish of St. Charles, La., 32 So. Rep. 523.

163. TRESPASS—Punitive Damages.— A trespass on another's land held not liable for punitive damages when the acts causing the injury were done in good faith.—Georgia R. & Bankin v. Gardner, Ga., 42 S. E. Rep. 250.

164. TRIAL—Findings of Fact.—Where a circuit court in an action tried without a jury, has made a general finding and rendered judgment thereon, it has no authority, without vacating such finding or judgment, to subsequently sign special findings and embody the same in the bill of exceptions —Corliss v. Pulaski County, U. S. C. C. of App., Seventh Circuit, 116 Fed. Rep. 289.

165. TRIAL—Marking of Instructions. — The mere fact that the trial judge did not mark "Given" on a charge which was requested by plaintiff and given held not reversible error —Bessemer Sav. Bank v. Anderson, Ala., 32 So. Rep. 716.

166. TRIAL—Presumption.—The court cannot comment upon the weight or credibility of the testimony, nor submit a disputable presumption as an imperative rule of law.—Winter v. Supreme Lodge K. P. Mo., 69 S. W. Rep. 662.

167. TRIAL—Sealed Verdict.—Where a jury has returned a sealed verdict, and it appeared, when read in their presence, that they had failed to compute the amount of recovery, it is proper to instruct them to retire and complete the verdict.—Canon v. Farmers' Bank, Neb., 91 N W. Rep. 585.

168. TRUSTS—Savings Account.—That a savings bank account was opened by a person in her own name in trus for another held not conclusive as to the trust.—*In re* Totten, 77 N. Y. Supp. 928.

169. VENDOR AND PURCHASER—Notice.—Record of a deed from another than the record owner is not constructive notice to a subsequent purchaser of a prior unrecorded deed.—Tennessee Coal, Iron & R. Co. v. Gardner, Ala., 32 So. Rep. 622.

170. VENDOR AND PURCHASER—Sale of Land. — After contract for sale of land easements appurtenant thereto belong to the vendee, and the vendor must account for their value.—Marvin v. Bernheimer, 77 N. Y. Supp. 915.

171. WATERS AND WATER COURSES—Cutting Trees.—The motive of a riparian owner in cutting trees on the bank of the stream, thereby causing greater evaporation, and in building dams, cannot affect the lawfulness of such acts with respect to owners lower down the stream.—Fisher v. Feige, Cal., 69 Pac. Rep, 618.

172. WATERS AND WATER COURSES—Overflow of Lake. —In an action for injuries from overflow of a lake, the burden was on plaintiff to show that the lake was under defendant's control.—Birmingham Ry. & Electric Co. v. Dorse, Ala., 32 So. Rep. 493.

173. WILLS—Attestation. — A will witnessed by persons signing their names after testator's name, and under the word "Witnesses," held not sufficiently witnessed.—*In re* Akers' Will, 77 N. Y. Supp. 643.

174. WILLS — Attestation.—Under the statute providing that wills must be attested by three or more credible witnesses in the presence of the testator and each other, it is not necessary that the witnesses know at the time they sign that the instrument is a will.—*In re* Claflin's Will Vt., 52 Atl. Rep. 1053.

175. WILLS—Beneficiaries.—Persons born after death of testator do not take under a bequest of a certain sum to each of the children of his nephews and nieces.—Pierce v. Knight, Mass., 64 N. E. Rep. 692.

176. WILLS — Declarations of Testator. — On a will contest, it was proper not to admit declarations of testatrix that the will in question was not her will.—Woodroof, v. Hundley, Ala., 32 So. Rep. 570.

177. WILLS—Posthumus Child.—Where testator gave to his wife all his property, stating that he knew she would take care of the children, and thereafter a child was born, it revoked the will.—Sutton v. Hancock, 42 S. E. Rep. 214.

178. WILLS—Rights of Legatees.—Legacies given in the first part of a will held proper to be paid before legacies given in the latter part thereof.—Morse v. Tilden, 77 N Y. Supp. 505.

179. WILLS—Subscription by Testator.—Subscription to will of illiterate by a mark or symbol cannot be dispensed with.—*In re* Beneventano's Will, 77 N. Y Supp. 651.

180. WILLS — Undue Influence.—Declarations made by a testator some time before his death as to his intentions held admissible to show will not made under undue influence.—*In re* Munger, 77 N. Y. Supp. 648.

181. WITNESSES — Adultery. — Husband of woman separately indicted held competent witness against male defendant in prosecution for living in adultery.—Campbell v. State, Ala., 32 So. Rep. 695.

182. WITNESSES — Competency. — The widow of an intestate, whose administrator is defendant in an action for land brought by the heirs at law of another intestate, held not disqualified from testifying as to transactions between her husband and the plaintiff. Elliott v. Banks, Ga., 42 S. E. Rep. 218.

183. WITNESSES — Former Statements. — Former statements and testimony of witnesses in conflict with their present testimony cannot be used by the adverse party for the purpose of showing their truthfulness, but only for impeachment. — *In re* Claflin's Will, Vt., 52 Atl. Rep. 1053.